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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 99-2614

ENRICO ST. CYR, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Argued: Mar. 30, 2000]
[Decided: Sept. 01, 2000]

Before: OAKES, WALKER and KEITH,*
Circuit Judges.

OAKES, *Senior Circuit Judge*:

The case before us presents legal questions of reviewability and retroactivity under the 1996 amendments to the Immigration and Nationality Act ("INA"). Congress amended the INA through the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 *et seq.* (1996) and the Illegal Immigration Reform and Immi-

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

grant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.* (1996). These laws severely narrowed the rights of certain classes of aliens, including those like St. Cyr who were ordered deported because of a prior drug conviction, and have spawned a multitude of judicial decisions.

AEDPA § 440(d) and IIRIRA § 304 significantly limit the cases where discretionary relief from removal can be sought. They effectively preclude an alien, who is removable from the United States because of a conviction of a crime that qualifies as an "aggravated felony" under the law, from applying for discretionary relief from removal. St. Cyr's removal proceedings were commenced after the enactment of the AEDPA and IIRIRA. However, St. Cyr pled guilty to the drug-related offense that rendered him deportable and ineligible under the AEDPA and IIRIRA to apply for discretionary relief a year before the statutes were enacted. He argues that applying the AEDPA § 440(d) and IIRIRA § 304 bar to his removal proceedings would have an impermissible retroactive effect. Thus, in this case, we must determine whether the bar to discretionary relief from removal is properly applied retroactively to pre-enactment guilty pleas.

BACKGROUND

Enrico St. Cyr, a native of Haiti, was admitted to the United States as a lawful permanent resident on June 17, 1986. St. Cyr's family lives in the United States. His parents and sister are citizens of this country and his brother is a lawful permanent resident.

On March 8, 1996, prior to the enactment date of the AEDPA and IIRIRA, St. Cyr pled guilty to the sale of a controlled hallucinogenic narcotic in violation of Connecticut General Statutes § 21a-277(a). At the time that St. Cyr pled guilty to the charge, the drug conviction rendered him deportable under the immigration laws. *See* INA § 241(a)(2)(B)(i), codified at 8 U.S.C. § 1251(a)(2)(B)(i) (1994), now renumbered as INA § 237(a)(2)(B)(i), codified at 8 U.S.C. § 1227(a)(2)(B)(i) (1999); *see also* INA § 241(a)(2)(A)(iii), codified at 8 U.S.C. § 1251(a)(2)(A)(iii) (1994), now renumbered as INA § 237(a)(2)(iii), codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (1999); INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43) (1999).[1]

On April 10, 1997, the Immigration and Naturalization Service ("INS") issued St. Cyr a Notice to Appear, charging him as removable under INA § 237(a)(2)(A)(iii) because he had been convicted of an aggravated felony. On January 12, 1998, an immigration judge ("IJ") found that St. Cyr was removable under INA § 237(a)(2)(A)(iii). In the time between St. Cyr's conviction and his receipt of a Notice to Appear, Congress enacted the AEDPA and IIRIRA. These laws significantly limited the cases where discretionary

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[1] INA § 237(a)(2)(B)(i) provides that "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving [a small amount of marijuana for one's own use] is deportable."; INA § 237(a)(2)(A)(iii) provides that "Any alien who is convicted of an aggravated felony at any time after admission is deportable."; INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43) defines "aggravated felony" to include illicit trafficking in a controlled substance.

relief from deportation could be sought and rendered an alien who was removable because of an aggravated felony conviction statutorily ineligible to apply for relief from deportation.

At his hearing, St. Cyr sought to prevent his removal by applying for a discretionary waiver of deportation under former INA § 212(c). *See* 8 U.S.C. § 1182(c) (1996) (repealed by IIRIRA, § 304(b), 110 Stat. at 3009-597, September 30, 1996). The IJ denied St. Cyr's § 212(c) application. St. Cyr appealed his removal order to the Board of Immigration Appeals ("BIA"). Because of the changes made by Congress to the immigration laws, specifically IIRIRA § 304(b)'s repeal of the availability of § 212(c) relief to aliens such as St. Cyr, the BIA dismissed his appeal on November 10, 1998.

On April 27, 1999, St. Cyr filed a habeas corpus petition in the United States District Court for the District of Connecticut. In his petition, he argued that § 440(d) of the AEDPA and IIRIRA § 304 should not be applied retrospectively to bar his eligibility for § 212(c) relief because both his criminal conduct and his conviction occurred prior to the statutes' enactment. The INS argued that the 1996 amendments to the INA divested the district court of jurisdiction to hear St. Cyr's habeas petition. On the merits, the INS argued that § 440(d) of the AEDPA was applicable to St. Cyr's case because removal proceedings had been commenced against him after the effective date of the AEDPA. Specifically, the INS argued that applying § 440(d) to aliens ordered deportable because of a criminal conviction that was entered prior to the AEDPA's effective date was not an unjustified retrospective application of § 440(d).

On August 23, 1999, the district court rejected the INS's arguments and held that it had jurisdiction to hear the habeas petition because the 1996 amendments to the INA did not explicitly divest a district court of its habeas jurisdiction over final removal orders under 28 U.S.C. § 2241. It concluded that the scope of its review pursuant to 28 U.S.C. § 2241 included St. Cyr's statutory claim that the BIA had misapplied the immigration laws.

In addressing the merits of St. Cyr's habeas petition, the district court held that AEDPA § 440(d) is inapplicable to an alien placed in removal proceedings after the AEDPA's enactment if the relevant convictions, criminal proceedings, or underlying criminal conduct occurred prior to enactment. The court reasoned that Congress did not intend AEDPA § 440(d) to be applied retroactively to such pre-enactment events because it would unfairly attach new legal consequences to pre-AEDPA criminal conduct. Thus, the district court concluded that St. Cyr's removal proceedings should be governed by the laws that were in effect at the time he committed the crime. The INS timely appealed.

DISCUSSION

I. Jurisdiction.

Because the question whether the district court had subject matter jurisdiction in this case is a question of law, we review it *de novo*. *See Conntech Dev. Co. v. University of Connecticut Educ. Properties, Inc.*, 102 F.3d 677, 681 (2d Cir. 1996).

The INS's arguments that the district court lacked jurisdiction under 28 U.S.C. § 2241 to decide St. Cyr's

claim are foreclosed by our decision in *Calcano-Martinez v. Reno*, Civ. Nos. 98-4033, 98-4214, 98-4246 (2d Cir. 2000), a case argued on the same day as this one. In that case, we held that the permanent rules of IIRIRA do not divest Article III courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available. Here, no such avenue existed because St. Cyr, convicted of a crime involving a controlled substance, is an alien deportable under INA § 237(a)(2)(A)(iii). A petition in the court of appeals pursuant to INA § 242(a)(1) is, therefore, unavailable to him. *See* 8 U.S.C. § 1252(a) (2)(C) (1999).

Although a federal court's habeas jurisdiction does not include all challenges that an alien may launch against his or her removal order, St. Cyr's habeas petition raises pure questions of law. He is not challenging the BIA's refusal to exercise its discretion in his favor. Rather, he is challenging the BIA's determination that it cannot legally consider St. Cyr's request to exercise its discretion. Therefore, his habeas challenge to his final order of removal is the type of claim that is cognizable in the district court under 28 U.S.C. § 2241.

Because there is no other avenue for judicial review available and St. Cyr's petition raises a purely legal challenge to his final order of removal, the district court had subject matter jurisdiction to review his habeas petition.

II. Availability of § 212(c) relief.

Having determined that the district court had jurisdiction to decide St. Cyr's claim, we turn to the issue

raised by St. Cyr in his habeas petition: whether AEDPA § 440(d) and IIRIRA § 304, which essentially make discretionary relief unavailable to an alien like St. Cyr, apply to his removal proceeding.

A. History of Discretionary Relief.

Under the law in effect prior to the enactment of the AEDPA, certain aliens otherwise determined to be deportable were entitled to apply to the Attorney General or her delegates[2] for a waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c) (1994). Former § 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [provisions setting forth various grounds for exclusion]. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years.

8 U.S.C. § 1182(c) (1994) (repealed by IIRIRA § 304(b), 110 Stat. at 3009-597, Sept. 30, 1996).

Although the literal terms of § 212(c) appeared to apply only to resident aliens who had temporarily proceeded abroad and were returning to the United States, since 1976 the section has been interpreted by this Court to permit the Attorney General to waive the

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[2] The Attorney General's delegates include IJs and the BIA.

grounds for deportation under certain conditions in the case of a lawfully admitted permanent resident in deportation proceedings. *See Buitrago-Cuesta v. INS*, 7 F.3d 291, 292 (2d Cir. 1993); *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976).

Discretionary relief from deportation, which has been available in our system in some form since at least 1917, *see Francis*, 532 F.2d at 270, provides the Attorney General with a mechanism to consider the impact of immigration on an alien's family. Prior to 1996, INA § 212(c) gave power to the Attorney General to permit a worthy alien to stay in this country in order to avoid extraordinary hardship to the alien's family in the United States. *See id.* at 272. In a case where a convicted alien demonstrated that he or she had a lawful unrelinquished domicile in the United States for at least seven years and that his or her conviction was not for an "aggravated felony," for which he or she had served a term of imprisonment of five years or longer, the Attorney General could, in her discretion, waive deportation. *See* 8 U.S.C. § 1182(c) (1994). Under the law in effect before 1996, if the Attorney General denied relief, the alien could challenge that denial by filing a petition for review in the court of appeals. *See* 8 U.S.C. § 1105a(a) (1994) (repealed by IIRIRA § 306(b), 110 Stat. at 3009-612, Sept. 30, 1996).

On April 24, 1996, Congress enacted the AEDPA, of which § 440(d) expanded the category of criminal convictions that would render an alien ineligible to apply for § 212(c) relief. The explicit goal of the AEDPA was to enhance "the ability of the United States to deport criminal aliens." H.R. Conf. Rep. No. 104-518, at 119

(1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 952.[3] Section 440(d) struck the language "has been convicted of one or more aggravated felonies" and that which followed in § 212(c) and inserted the following bar:

> This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

AEDPA § 440(d), 110 Stat. at 1277.[4] Under the amended version, a waiver could not be granted to an alien convicted of certain enumerated offenses including a drug-related crime, two or more offenses involving

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[3] This was by no means Congress's first attempt to narrow a criminal alien's eligibility for a waiver from deportation. Congress passed the Anti-Drug Abuse Act of 1988 and made conviction of an aggravated felony an additional ground for deportation. *See* Anti-Drug Abuse Act of 1988 § 7344, 102 Stat. at 4470-71 (codified at 8 U.S.C. § 1251(a)(2)(A)(iii) (1996)). In 1990, Congress amended § 212(c) and precluded waiver for aliens convicted of aggravated felonies who had served at least five years in prison for the conviction. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990), codified at 8 U.S.C. § 1182(c). Also in 1990, Congress expanded the definition of aggravated felony to include more offenses and render a greater number of criminal aliens ineligible for discretionary relief. *See id.* § 501, 104 Stat. at 5048. Again, in 1994, Congress expanded the definition of aggravated felony to include more classes of crimes. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416 § 222(a), 108 Stat. 4305, 4322 (1994), codified at 8 U.S.C. § 1101(a)(43).

[4] INA § 241, codified at 8 U.S.C. § 1251 (1994) was renumbered by IIRIRA as INA § 237, codified at 8 U.S.C. § 1227. *See* IIRIRA § 305(a)(92), 110 Stat. at 3009-598.

moral turpitude, and an aggravated felony, regardless of time served in prison.

Just a few months later, on September 30, 1996, Congress enacted IIRIRA, which wrought further changes to the availability of deportation waivers. IIRIRA included temporary transitional rules and permanent rules. Under the statutory interplay of IIRIRA's transitional rules and the AEDPA, the Attorney General was able, in her discretion, to grant relief from deportation under INA § 212(c) as amended by § 440(d). *See* IIRIRA § 309(c)(1), 110 Stat. at 3009-625 (most of IIRIRA amendments to the INA do not apply to aliens placed in deportation proceedings prior to April 1, 1997); *see also Tasios v. Reno*, 204 F.3d 544, 547 n.1 (4th Cir. 2000).

The permanent provisions of IIRIRA, however, repeal INA § 212(c) altogether and consolidate prior "suspension of deportation" relief and aspects of former § 212(c) relief into an entirely new form of relief. *See* 8 U.S.C. § 1229b(a)(3) (1999). Section 304(a) of IIRIRA, entitled "Cancellation of removal for certain permanent residents," found at INA § 240A, provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a) (1999). Cancellation of removal is thus limited to a smaller category of aliens than had historically been eligible for pre-AEDPA § 212(c) relief because it is unavailable to all aliens convicted of aggravated felonies and not just to those imprisoned for more than five years. *Compare* 8 U.S.C. § 1182(c) (1994) *with* 8 U.S.C. § 1129b (1999). Cancellation of removal, however, is categorically available to a larger number of aliens than those eligible under AEDPA § 440(d) because it restores the availability of discretionary relief for aliens deportable because they committed two or more crimes of moral turpitude under INA § 237(a)(2)(A)(ii). *Compare* 8 U.S.C. § 1182(c) as amended by AEDPA § 440(d) *with* 8 U.S.C. § 1229b (1999).

This complex statutory history applies to St. Cyr as follows: when St. Cyr pled guilty to drug trafficking in March of 1996, he was deportable under the immigration laws as an alien convicted of a drug-related offense which constituted an aggravated felony as defined under the INA. *See* 8 U.S.C. § 1251(a)(2)(B)(i) (1994); 8 U.S.C. § 1251(a)(2)(A)(iii) (1994); 8 U.S.C. § 1101(a)(43). At the time he pled guilty to the deportable offense, he was eligible to apply for a waiver of deportation under § 212(c) of the INA. On April 24, 1996, before removal proceedings were commenced against St. Cyr, AEDPA § 440(d) was enacted, making aliens such as he ineligible to apply for a § 212(c) waiver. By April 10, 1997, the date that removal proceedings against St. Cyr were commenced, INA § 212(c) relief had been repealed by IIRIRA § 304(b) and replaced by "cancellation of re-

moval" in § 304(a). St. Cyr was ineligible to apply for "cancellation from removal" by its terms because he was convicted of an aggravated felony. *See* 8 U.S.C. § 1101(a)(43). Thus, if either AEDPA § 440(d) or IIRIRA § 304 apply to this case, as the INS argues, St. Cyr is removable because he pled guilty to a deportable offense and is statutorily ineligible to apply to the BIA for discretionary relief from deportation.

B. Retroactivity.

Our analysis of whether AEDPA § 440(d) and IIRIRA § 304 (referred to collectively as "the bar to relief") apply to removal proceedings against an alien who pled guilty to a deportable crime before the date of IIRIRA's enactment is governed by the legal principles announced by the Supreme Court in its landmark decisions, *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994) and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 138 L.Ed.2d 135 (1997). The Supreme Court directs that we begin with the "presumption . . . deeply rooted in our jurisprudence," against the retroactive application of legislation. *Landgraf*, 511 U.S. at 265; *Hughes Aircraft*, 520 U.S. at 946 (quoting *Landgraf*). This "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, *J.*, concurring)). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* Application of this presumption requires that statutes are not

afforded retrospective effect unless "Congress has clearly manifested its intent to the contrary." *Hughes Aircraft*, 520 U.S. at 946.

The Supreme Court in *Landgraf* provided the following framework for determining whether a law should apply to cases where the underlying conduct occurred prior to enactment:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. 511 U.S. at 280. *Landgraf* therefore contemplates a two-step inquiry: (1) whether Congress prescribed the statute's temporal reach and, if not, (2) a determination whether retrospective application would have a "retroactive effect." If application of the statute to the conduct at issue would have a retroactive effect, "then, in keeping with our 'traditional presumption' against retroactivity, we presume that the statute does not apply to that conduct." *Martin v. Hadix*, 527 U.S. 343, 352,

119 S. Ct. 1998, 144 L.Ed.2d 347 (1999) (quoting *Landgraf*, 511 U.S. at 280).

1. Congressional Intent.

Our first step under *Landgraf* is to determine, using ordinary tools for statutory interpretation, whether Congress expressly prescribed that AEDPA § 440(d) and IIRIRA § 304 should be applied to removal proceedings involving convictions entered prior to its enactment. *See* 511 U.S. at 280. In *Henderson v. INS*, 157 F.3d 106, 129-30 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999), we analyzed whether AEDPA § 440(d) applied to deportation proceedings pending on the date of enactment. Our analysis ended after the first *Landgraf* step because there existed "abundant direct evidence that the section was *not* intended to apply retroactively" to deportation proceedings pending on the date of enactment. *See id.* at 129. Our decision that Congress clearly intended that AEDPA § 440(d) not apply to aliens for whom deportation proceedings had, on the date of AEDPA's enactment, already commenced, was in accord with the majority of U.S. Courts of Appeals to consider the same question. *See Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 675-76 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1303-04 (11th Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 133 (1st Cir. 1989), *cert. denied*, *Reno v. Goncalves*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999); *Sandoval v. Reno*, 166 F.3d 225, 241-42 (3d Cir. 1999); *LaGuerre v. Reno*, 164 F.3d 1035, 1040-41 (7th Cir. 1998), *cert. denied*, *Reno v. LaGuerre*, —— U.S. ——, 120 S. Ct. 1157, 145 L.Ed.2d 1069 (2000).

The specific issue raised in this case, however, is not whether the bar to relief applies to pending removal proceedings but whether it bars an alien who pled guilty to the deportable crime before the AEDPA or IIRIRA's effective date from applying for a waiver. The question whether Congress intended AEDPA § 440(d) to apply to removal proceedings against an alien ordered removed because of a pre-enactment conviction or criminal conduct has been much discussed in numerous published opinions of district courts and courts of appeals. When the past conduct under the *Landgraf* analysis changes from the commencement of removal proceedings to the conviction or criminal conduct, the majority of courts of appeals that have considered AEDPA § 440(d) conclude that Congress's intent whether to apply the law retrospectively is ambiguous. *See Mattis v. Reno*, 212 F.3d 31, 36 (1st Cir. 2000); *Tasios v. Reno*, 204 F.3d 544, 550 (4th Cir. 2000); *Magana-Pizano*, 200 F.3d at 612; *Requena-Rodriquez v. Pasquarell*, 190 F.3d 299, 307-8 (5th Cir. 1999); *DeSousa v. Reno*, 190 F.3d 175, 186-87 (3d Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1150 (10th Cir. 1999), *cert. denied Palaganas-Suarez v. Greene*, ___, U.S. ___, ___ U.S. ___, 120 S. Ct. 1539, 146 L.Ed.2d 352 (2000); *Turkhan v. Perryman*, 188 F.3d 814, 826 (7th Cir. 1999). We agree with the majority of courts that have held that Congress's intent whether to apply AEDPA § 440(d) to pre-enactment convictions is ambiguous and because the question has been thoroughly analyzed in the foregoing opinions, we do not set forth our own detailed analysis of AEDPA § 440(d).

We turn now to IIRIRA § 304(b). The INS argues that, unlike AEDPA § 440(d), Congress provided

specific "statutory guidance" in IIRIRA § 309(a) as to whether IIRIRA § 304 reaches back to bar an alien who pled guilty to a deportable crime before the effective date of IIRIRA. IIRIRA § 309(a) provides that the new rules added by IIRIRA §§ 301-308, including IIRIRA's repeal of § 212(c) relief and substitution of cancellation of removal relief contained in IIRIRA § 304(a), apply to an alien covered by the rules unless that alien is currently in removal proceedings. *See* IIRIRA § 309(a), 110 Stat. at 3009-625 (new rules apply except to "an alien who is in exclusion or deportation proceedings as of [April 1, 1997]"). Thus, according to the INS, Congress indicated that IIRIRA's permanent rules, including § 304, apply in cases such as St. Cyr's that are commenced after April 1, 1997.

We disagree that IIRIRA's general effective date provision set forth in IIRIRA § 309(a) demonstrates that Congress carefully considered whether the repeal of the only opportunity for relief from removal should bar that relief for an alien who pled guilty prior to IIRIRA's enactment to the crime rendering him or her removable. In *Landgraf*, the Supreme Court noted that a provision stating that "[a] statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." 511 U.S. at 257. Although the language in IIRIRA § 309(a) is arguably more direct than a typical effective date provision, it is not precise enough to mandate retroactive application of IIRIRA § 304 under the first step of the *Landgraf* inquiry. "[T]he only presumption mentioned in [*Landgraf*] is a general presumption *against* retroactivity," *Hughes Aircraft*, 520 U.S. at 950. Accordingly, in its post-*Landgraf* decisions, the Supreme Court has indicated

that a "heightened level of clarity" is required to justify the retroactive application of a law that implicates past conduct. *See Salahuddin v. Mead*, 174 F.3d 271, 275 (2d Cir. 1999) (citing *Lindh v. Murphy*, 521 U.S. 320, 328 n.4, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997); *Hughes Aircraft*, 520 U.S. at 946 (1997)). Therefore, Congress must have used statutory language that can "sustain only one interpretation" in order to make IIRIRA § 304 retroactive to pre-enactment guilty pleas. *See Lindh*, 521 U.S. at 328 n.4. We shall not infer from the general language contained in IIRIRA § 309(a), making § 304 effective in pending proceedings, that Congress also intended the bar to discretionary relief to apply to pre-enactment guilty pleas, an application that we hold today has an impermissible retroactive effect. *See infra* at Section IIB(2).

An examination of other IIRIRA provisions demonstrates that despite the general effective date provision, Congress made sure to use specific language, capable of only one interpretation, when it clearly intended a provision to apply to past conduct relevant to the particular provision. *See, e.g.*, IIRIRA § 321(c), 110 Stat. at 3009-628 (providing that amended definition of "aggravated felony" applies regardless of "when the *conviction* occurred") (emphasis added); IIRIRA § 322(c), 110 Stat. at 3009-629 (providing that new definitions of "conviction" and "term of imprisonment" shall apply "to *convictions* and *sentences* entered before, on, or after the date of the enactment of this Act") (emphasis added); IIRIRA § 324(c), 110 Stat. at 3009-629 (providing that provision governing re-entry of deported aliens applies to "*departures* that occurred before, on, or after the date of enactment" of IIRIRA) (emphasis added); IIRIRA § 347(c), 110 Stat. at 3009-

639 (providing that provision rendering an alien deportable because he or she voted in violation of the law is applicable to "*voting* occurring before, on, or after the date of the enactment of this Act.") (emphasis added). Indeed, that Congress knew how to explicitly make an IIRIRA provision applicable to "convictions and sentences entered before, on, or after the date of the enactment of the Act," is demonstrated by IIRIRA § 321(c) and IIRIRA § 322(c). Because Congress made some provisions specifically applicable to prior convictions but did not do so in regard to IIRIRA § 304, it appears that Congress did not definitively decide the issue of § 304's retroactive application to pre-enactment convictions.

The INS notes that the removal ground underlying St. Cyr's proceedings, made applicable by IIRIRA, renders aliens subject to removal proceedings if they were "*convicted* of an aggravated felony at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii) (1999) (emphasis added). The INS argues that the use of past-tense language to qualify the timing of a deportable conviction shows that Congress clearly intended that an alien, such as St. Cyr, who committed his or her crime and was convicted prior to IIRIRA's April 1, 1997, effective date would become subject to removal proceedings in which § 212(c) relief is no longer available.

We are not persuaded that the use of the past tense in INA § 237 is an indication that Congress intended IIRIRA § 304 to apply retrospectively. A similar argument was considered and rejected by the Supreme Court in *Martin v. Hadix*, 527 U.S. at 354-55. There, the Court considered the retroactivity of the Prison

Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(d)(3), which limited the fees available to prisoners' attorneys who were monitoring prisons post-judgment. *See Martin*, 527 U.S. at 347. The petitioners argued that the language of § 803(d)(1)—"[i]n *any* action *brought* by a prisoner who is confined [to a correctional facility] . . . attorney's fees . . . shall not be awarded"—clearly expressed a congressional intent that § 803(d) apply to pending cases. *Id.* at 2003-4 (emphasis added). The Court rejected the argument that Congress's use of a past-tense verb clearly indicated Congress's intent that the provision apply to pending cases. The Court reasoned that § 803(d)(1) "define[s] the substantive availability of attorney's fees; [it] [does] not purport to define the temporal reach of these substantive limitations." *Id.* at 354. Thus, the Court concluded that the language fell short of demonstrating a clear congressional intent to apply § 803(d) retrospectively to pending cases and that had Congress intended the provision to apply to all fee orders, including those compensating work performed before the effective date, "it could have used language more obviously targeted to addressing the temporal reach of that section." *Id.*

Under the reasoning of *Martin*, the use of a past-tense verb in INA § 237(a)(2)(iii) is not dispositive of Congress's intent to apply IIRIRA § 304 retroactively to pre-enactment convictions. The language "convicted of an aggravated felony" in INA § 237(a)(2)(iii) is used to describe the substantive availability for removal from the United States. It is not used to describe the retrospective application of IIRIRA § 304. We therefore cannot and will not rely on the text of INA § 237(a)(2)(A)(iii) to hold that IIRIRA § 304 applies in

cases where an alien pled guilty to the underlying deportable crime prior to IIRIRA's enactment.

This is not to say that the INS's argument is not sophisticated. In *Salahuddin*, this Court relied on a similarly formulated argument to hold that Congress clearly intended that a statute be applied prospectively. 174 F.3d at 274-75. In that case, the appellant argued that the exhaustion requirement of 42 U.S.C. § 1997e(a), as amended by the PLRA, should not apply to an action pending at the time of its enactment. *See id.* at 272. Because the new provision provided that no action "shall be brought" until administrative remedies are exhausted, we concluded that a plain reading of the statute made it clear that Congress intended it to be applied prospectively. *Id.* at 274. We reasoned there that the use of the future tense in the provision was sufficient evidence of Congress's intent to apply the statute prospectively. *See id.* at 274-75. An interpretation that supports the application of a statute prospectively, however, does not justify its retroactive application. *See id.* at 275 (distinguishing between interpretations justifying prospective and retroactive applications); *see also Goncalves*, 144 F.3d at 129 (refusing to require that Congress draft an explicit effective date provision to insure against retroactive application because that rule would reflect a presumption in favor of retroactive application). The longstanding presumption is *against*, not in favor of, the retroactive application of a statute to pre-enactment conduct. *See Landgraf*, 511 U.S. at 265. Were we to infer from the sole use of a tense that Congress intended the IIRIRA § 304 bar to apply to past conduct, we would reverse this established presumption. Therefore, although we interpreted a 42 U.S.C. § 1997e(a) in *Salahuddin* to

apply prospectively based on the use of future tense phraseology, the presumption against retroactive application requires a more explicit statement from Congress to interpret IIRIRA § 304 to apply retroactively.[5]

In sum, we conclude that there is no clear evidence that Congress considered and decided whether IIRIRA § 304's bar to relief from removal applies retrospectively to removal proceedings commenced after IIRIRA's enactment against an alien who pled guilty to the underlying criminal conduct before its enactment. The requirement that Congress "first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511

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[5] St. Cyr, relying on a brief submitted in the consolidated cases, *Calcano-Martinez v. INS*, Civ. Nos. 99-4033; 98-4214; 98-4246 (2d Cir. [Sept. 1, 2000]), agrees that IIRIRA lacks an express directive that the statute apply retrospectively and contends that IIRIRA reveals Congress's explicit intent that "cancellation of removal" be applied only to those cases involving post-enactment convictions. According to St. Cyr, the absence of specific retrospective language in IIRIRA § 304, when such language is used in other IIRIRA provisions, requires the court to infer by negative implication that Congress clearly intended IIRIRA § 304 to apply prospectively. We disagree. The provisions for which Congress expressly provided a retroactive temporal reach cover distinct subject matters that are too dissimilar to the availability of discretionary relief to support a negative inference in favor of prospective application of IIRIRA § 304. *See Martin*, 527 U.S. at 356-57. In addition, the effective date provision in IIRIRA § 309(a), although it does not make IIRIRA § 304 retroactive to pre-enactment convictions, does render Congressional intent ambiguous. Therefore, we decline to infer from this lack of guidance that Congress intended IIRIRA § 304 to apply only prospectively and hold that Congress's intent as to the section's temporal reach is ambiguous.

U.S. at 268. The statutory language does not convince us, and the INS has pointed to no legislative history in support of the conclusion, that Congress specifically considered the precise issue whether IIRIRA § 304 should be applied to an alien who rendered a pre-enactment guilty plea. Therefore, we hold Congress's intent with respect to the application of IIRIRA § 304 to pre-enactment convictions is unclear.[6]

2. Retroactive Effect.

Having concluded that no clear congressional intent exists as to whether AEDPA § 440(d) or IIRIRA § 304

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[6] In some cases, the interest in avoiding constitutional questions will cause a court to refrain from applying a statute retroactively. *See Landgraf*, 511 U.S. at 267 n.21 (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1976)). Our holding in this case is guided, in part, by that principle. Even when Congress clearly intends that legislation is to be applied to past conduct, Congress's broad power to enact retroactive legislation does not go completely unchecked. The Fifth Amendment's Due Process Clause places a narrow limit on Congress's power to sweep away citizens' settled expectations under the law. The Constitution's safeguard against retroactivity is especially appropriate where it protects an unpopular group or individual. *See Landgraf*, 511 U.S. at 266; *Pottinger*, 51 F. Supp. 2d at 361 (the presumption against retroactivity "reflects our enduring commitment to the protection of the unpopular and the voiceless from the retributive and vindictive use of retroactive legislation."). Because, in our view, a profound constitutional question would arise under the Fifth Amendment's Due Process Clause were we to interpret IIRIRA as precluding the availability of § 212(c) relief in cases where an alien pled guilty or *nolo contendere* in reliance on the availability of § 212(c) relief, our ruling today that IIRIRA § 304 does not apply retroactively to pre-enactment guilty pleas avoids this result.

apply to an alien who pled guilty to a removable crime prior to the statute's enactment, we must determine whether a bar to relief has any retroactive effect. *See Landgraf*, 511 U.S. at 280; *Hughes Aircraft*, 520 U.S. at 946. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 511 U.S. at 269. Rather, our inquiry requires a "common sense, functional judgment" to determine "whether the new provision attaches new legal consequences to events completed before its enactment." *Martin*, 527 U.S. at 357-58 (quoting *Landgraf*, 511 U.S. at 270). A statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" has retroactive effect. *Landgraf*, 511 U.S. at 280.

We are the first U.S. Court of Appeals to consider whether applying IIRIRA § 304 to pre-enactment convictions is impermissibly retroactive. A number of our sister courts, however, have considered the similar question of whether the scope of AEDPA § 440(d) extends to deportation proceedings that involve convictions or guilty pleas that occurred prior to the AEDPA's enactment. The Tenth, Fifth, and Third Circuits have analyzed whether AEDPA § 440(d) was retroactive as applied to aliens whose criminal convictions occurred prior to the AEDPA's effective date. *See Jurado-Gutierrez*, 190 F.3d at 1147; *Requena-Rodriquez*, 190 F.3d at 306; *DeSousa*, 190 F.3d at 185. Having found that Congressional intent to apply AEDPA § 440(d) retrospectively was ambiguous, these Courts, adopting the INS's position, determined that there existed no impermissible retroactive effect in

applying AEDPA § 440(d) to pre-enactment convictions. *See Jurado-Gutierrez*, 190 F.3d at 1150-52; *Requena-Rodriquez*, 190 F.3d at 307-8; *DeSousa*, 190 F.3d at 187.

In three very recent cases, the First, Fourth, and Ninth Circuits had occasion to consider specifically whether AEDPA § 440(d) reached backward to cover a pre-enactment guilty or *nolo contendere* plea to an otherwise qualifying offense. *See Mattis*, 212 F.3d at 37; *Tasios*, 204 F.3d at 551; reh'g *en banc* denied, *Tasios v. Reno*, No. 99-6061 (9th Cir.) (May 25, 2000); *Magana-Pizano*, 200 F.3d at 612. In these cases, the relevant conduct for the retroactive determination was specifically a guilty or *nolo contendere* plea. The Fourth Circuit concluded that application of AEDPA § 440(d)'s bar on discretionary relief previously afforded by INA § 212(c) to guilty pleas made before the AEDPA's enactment "would upset reasonable, settled expectations and change the legal effect of prior conduct." *Tasios*, 204 F.3d at 552. Accordingly, that Circuit adopted a blanket rule that AEDPA § 440(d) does not apply retroactively. *See id.* The First and Ninth Circuits, adopting a middle ground, determined that AEDPA § 440(d) should not apply to an alien who can make a specific showing that he or she entered a guilty or *nolo contendere* plea in reliance upon the relief afforded by INA § 212(c). *See Mattis*, 212 F.3d at 39-40; *Magana-Pizano*, 200 F.3d at 613-14.

Finally, the Seventh Circuit has developed an approach that is in accord with the decisions of the First and Ninth Circuits. It has announced a general rule that AEDPA § 440(d)'s bar on INA § 212(c)'s discretionary relief applies retroactively to pre-enactment

guilty pleas. *See LaGuerre*, 164 F.3d at 1041; *Turkhan*, 188 F.3d at 827. It has also, however, identified a particular set of circumstances where applying AEDPA § 440(d) to past conduct would have an impermissible retroactive effect. Under the law of the Seventh Circuit, AEDPA § 440(d) applies retrospectively unless an alien actually had conceded deportability, despite a colorable defense, in reliance upon receiving a § 212(c) waiver. *See Turkhan*, 188 F.3d at 827; *Morales-Ramirez v. Reno*, 209 F.3d 977, 982 (7th Cir. 2000).

We conclude that AEDPA § 440(d) and IIRIRA § 304 as applied to a guilty or *nolo contendere* plea that predates the statutes' enactment has an impermissible retroactive effect. In so holding, we follow the reasoning of the Fourth Circuit in *Tasios v. Reno* that such an application of the bar to relief would upset settled expectations and change the legal effect of prior conduct.

As an initial matter, we note that it is difficult to argue that barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct—as opposed to a plea going to the guilt of a deportable crime—constitutes an impermissible retroactive application of a statute. Indeed, we agree that,

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

Jurado-Gutierrez, 190 F.3d at 1150-51 (quoting *La-Guerre*, 164 F.3d at 1041). Thus, we conclude that the bar to discretionary relief applies regardless of whether a legal permanent alien's underlying criminal conduct pre-dated the AEDPA or IIRIRA.

However, in *Hughes Aircraft*, the Supreme Court conducted a retroactivity analysis that was not focused solely on the petitioner's primary conduct, but also on the relevant secondary conduct. *See* 520 U.S. at 947-48. Furthermore, "it is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." *Mattis*, 212 F.3d at 37. Thus, in considering whether the changes to the availability of discretionary relief would alter the legal effect of conduct that predates the AEDPA and IIRIRA's enactment, our analysis focuses on the decision to enter a guilty plea to a crime—not on the criminal conduct—that qualifies the alien for removal under the immigration laws.

A "legal change that would have an impact on private parties' planning" triggers the presumption against retroactivity. *See Landgraf*, 511 U.S. at 282-83. A number of courts have documented that "an alien charged with a crime [making him eligible for deportation] would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial. . . ." *Tasios*, 204 F.3d at 552 (quoting *Magana-Pizano*, 200 F.3d at 612); *see also Pottinger v. Reno*, 51 F. Supp. 2d. 349, 362-63 (E.D.N.Y. 1999); *Wallace v. Reno*, 24 F. Supp. 2d 104, 110 (D. Mass. 1998), *aff'd* 194 F.3d 279 (1st Cir. 1999); *Mojica v. Reno*, 970 F.Supp. 130, 177 (E.D.N.Y. 1997), *aff'd in part, dismissed in part*, *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998);

Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996).

As the Amici[7] in this case demonstrate, a legal resident who is charged with a crime that renders him removable from the United States carefully considers the immigration consequences of his or her conviction and, specifically, the availability of discretionary relief from removal. It is not unreasonable to attribute knowledge of the availability of relief to a legal resident because it is a common requirement that defense counsel and the court advise a criminal defendant of the immigration consequences of a guilty plea. Additionally, an attorney's professional duty to his or her client includes advising that client of the immigration consequences of a plea or conviction. *See Magana-Pizano*, 200 F.3d at 612; *see also ABA Standards for Criminal Justice*, Pleas of Guilty, Standard 14-3.2, commentary at 75 (2d ed. 1982) (providing that where it is apparent that a defendant faces deportation as a result of conviction, counsel "should fully advise the defendant of these consequences."); *National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation*, Guideline 6.2(a)(3) and commentary (1994) (recognizing that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation."). A criminal defense law treatise provides that:

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[7] In regard to this point, Amici include The Legal Aid Society of the City of New York, The New York State Association of Criminal Defense Lawyers, and the New York State Defenders Association. These briefs were submitted in *Calcano-Martinez v. INS*, Civ. Nos. 99-4033; 98-4214; 98-4246 (2d Cir. 2000).

> Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. Thus, the immigration consequences of a prosecution may totally alter the strategies chosen . . . a[ny] attorney who suspects that this client is an alien has a duty to inquire and to protect his client's immigration status. Pleas and admissions must be approached with caution and with knowledge of the consequences. . . .

3 *Bender's Criminal Defense Techniques* (1999) § 60A.01 and § 60A.2[2]. Furthermore, lawful permanent residents are typically part of a resident alien community and are likely aware of what happens to other members of the community who engage in criminal conduct. *See Pottinger*, 51 F. Supp. 2d at 363.

There is also little doubt that before the AEDPA and IIRIRA were enacted, an alien's reliance on the possibility of receiving a waiver of deportation was reasonable because there was a strong possibility that he or she would receive relief. *See Tasios*, 204 F.3d at 551 ("in the years immediately preceding the enactment of AEDPA, immigration judges and the BIA granted over half of the § 212(c) applications they decided"). When a request was denied, an alien could petition a court of appeals for review and, "on a nontrivial number of occasions," these denials were overturned. *See id.* at 551-52 (quoting *Reyes-Hernandez*, 89 F.3d at 492).

When, in March of 1996, St. Cyr pled guilty to his drug-trafficking offense, he and legal residents in his position were removable from the United States. He and others like him, however, could depend on the availability of a hearing to determine his eligibility for

relief from removal. Given the dramatic impact removal would have on a legal resident's life, it is likely that a legal resident would, because of the possibility of receiving a lighter sentence, only decide to concede guilt to a crime that renders him or her removable in order to be eligible to apply for relief from removal. Under the law today, this settled expectation is upset dramatically. For certain classes of aliens, there is currently no reason to forgo fighting the conviction of a qualifying crime and enter a plea because, pursuant to the AEDPA and IIRIRA, there is no possibility of relief from removal as a result of the plea.

"[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. Because there is sufficient evidence that a legal resident accused of a crime that renders him or her removable from this country would have conformed his or her conduct according to the availability of relief when he or she pled guilty, AEDPA § 440(d) and IIRIRA § 304 would severely upset settled expectations were it applied retroactively to pre-enactment guilty pleas. A repeal of the eligibility to apply for relief from removal would attach new legal consequences to a legal resident's guilty plea to a removal crime. Therefore, AEDPA § 440(d) and IIRIRA § 304 have an impermissible retroactive effect as applied to pre-enactment guilty pleas.

We are not persuaded that, as the INS argues, because the bar to relief can be described as a new jurisdictional rule—in that it gives the Attorney General jurisdiction to grant a waiver in her discretion—it automatically has no retroactive effect. It is true

that a change in law that "speak[s] to the power of the court rather than to the rights or obligations of the parties" may be applied in a case without raising concerns that it is impermissibly retroactive. *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S. Ct. 554, 121 L.Ed.2d 474 (1992) (Thomas, *J.* concurring). In *Hughes Aircraft*, however, the Supreme Court explained that a jurisdictional statute that does not "merely address [ ] *which* court shall have jurisdiction to entertain a particular cause of action" but, rather, affects "*whether* [a claim] may be brought at all" should not presumptively be given retroactive effect. 520 U.S. at 951. AEDPA § 440(d) and IIRIRA § 304 do not merely change the degree of deference to be afforded a § 212(c) request or change the judicial or administrative forum in which relief may be granted. Rather, they alter the substantive rights of aliens subject to removal proceedings because it eradicates a form of relief previously available. By their terms, AEDPA § 440(d) and IIRIRA § 304 attach new substantive legal consequences to a guilty or *nolo contendere* plea to a deportable crime and would have an impermissible retroactive effect if applied to pre-enactment pleas.

Our conclusion here is consistent with the law of this Circuit. In *Buitrago-Cuesta*, we considered a 1990 amendment to INA § 212(c) which precluded an alien who had "been convicted of an aggravated felony and has served a term of at least 5 years" from seeking a discretionary waiver from deportability. *See* 7 F.3d at 292. The petitioner in that case argued that because at the time of his conviction his crime was not defined as an "aggravated felony," the 1990 amendment should not apply to his deportation proceeding commenced prior to

the amendment. *See id.* We decided that Congress intended that the 1990 amendment be applied retrospectively. *See id.* at 295. Since we decided *Buitrago-Cuesta*, however, the Supreme Court has decided *Landgraf*, *Hughes Aircraft*, and *Martin*, cases that honed retroactivity principles. *See id.* at 293 ("[at time of decision] [t]he Supreme Court's position on the retroactivity of civil statutes is somewhat unclear."). Moreover, the petitioner in *Buitrago-Cuesta* did not pled guilty to a deportable crime but instead was convicted after a jury trial in state court. *See id.* at 293. Therefore, our ruling today that the 1996 amendments insofar as they bar relief afforded prior to their enactment have a retroactive effect as applied to pre-enactment guilty pleas—a situation where an alien is likely to strategize according to the availability of discretionary relief—does not contradict our earlier ruling in *Buitrago-Cuesta*.

The INS's warning against "an absurd superprospective result" is also unfounded. We do not rule today that application of the 1996 amendments to pre-enactment convictions has an impermissible retroactive effect. Rather, we hold that AEDPA § 440(d) and IIRIRA § 304 do not apply to pre-enactment guilty pleas or pleas of *nolo contendere* because such an application would upset reasonable, settled expectations and change the legal effect of prior conduct. Our ruling affects the narrow class of cases where an alien pled guilty to a criminal offense that qualifies as a removable crime. Discretionary relief as amended by AEDPA § 440(d) still applies to all aliens with convictions predating its enactment and to all guilty pleas entered after its effective date. Likewise, cancellation of removal still applies to all aliens with convictions pre-

dating IIRIRA and to all guilty pleas entered by aliens to deportable crimes after it took effect.

CONCLUSION

In sum, we hold that the district court had habeas corpus jurisdiction under 28 U.S.C. § 2241 to review St. Cyr's challenge to the BIA's interpretation of AEDPA § 440(d) and IIRIRA § 304. On the merits, we hold that the bar on applying for relief enacted in AEDPA § 440(d) and IIRIRA § 304 does not apply to an alien who pled guilty or *nolo contendere* to an otherwise qualifying crime prior to IIRIRA's enactment date. Because we determine that these laws do not apply retroactively to St. Cyr, we do not decide his constitutional challenges. The district court is affirmed insofar as it held that the bar to discretionary relief from removal does not apply to guilty and *nolo contendere* pleas entered before IIRIRA's enactment.

JOHN M. WALKER, Jr., *Circuit Judge, Dissenting:*

Because I find Congress's intent plain on the face of the statute not to permit withholding of deportation or, in the parlance of the new law, cancellation of removal to aliens in appellee's position, I respectfully dissent.

There is no doubt that it is within Congress's power to redefine what will subject an alien to removal, *see Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976), and that Congress may effect such changes to require removal of an alien who would not have been subject to removal before the changes became effective,[8] *see United States v. Koziel*, 954 F.2d 831, 834 (2d Cir. 1992) (upholding retroactive repeal of Judicial Recommendations Against Deportation for certain criminal aliens); *Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 99 L.Ed. 1107 (1955) (permitting deportation based on conviction that would not have been a basis for deportation when the crime was committed). Indeed, there is a long tradition of Congress retroactively changing the qualifications for aliens' con-

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[8] The majority hints that removing 8 U.S.C. § 1182(c) ("§ 212(c)") relief retroactively would raise "a profound constitutional question." *Supra* at [24 n.6]. I share no such concern. Congress's plenary power to define the conditions of aliens' continued residence in this country gives Congress the authority to remove § 212(c) relief, as advocated by the INS. I do not dispute the general presumption against the retroactive application of congressional enactments, especially where the rights of "an unpopular group or individual" are affected. *Id.* But this is not an issue of constitutional dimension. Accordingly, I share the view of the majority, as expressed in the body of its opinion, that our inquiry here is governed by retroactivity analysis and not by the canon of construction requiring us to avoid constitutional questions.

tinued residence in the United States. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 593, 72 S. Ct. 512, 96 L.Ed. 586 (1952); *Mahler v. Eby*, 264 U.S. 32, 39, 44 S. Ct. 283, 68 L.Ed. 549 (1924); *Bugajewitz v. Adams*, 228 U.S. 585, 592, 33 S. Ct. 607, 57 L.Ed. 978 (1913). While there is little doubt that Congress may alter the requirements for continued residence in this country, identifying when Congress has chosen to exercise its power retroactively has proven a more difficult problem and it is here that my views diverge from those of my colleagues.

The majority's opinion has correctly identified the nature of the inquiry that we must undertake. *See supra* [13a-14a] (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). The threshold question in the *Landgraf* framework is whether Congress has expressly provided for a statute's retroactive application. If so, our inquiry is at an end. *See id.*; *Martin v. Hadix*, 527 U.S. 343, 352, 119 S. Ct. 1998, 144 L.Ed.2d 347 (1999). The majority has found ambiguity in the temporal reach of Congress's repeal of § 212(c) relief for criminal aliens. I disagree.

I believe that Congress's intent is clear on the face of the statute and that IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.* (1996), has removed the availability of § 212(c), or equivalent relief, from criminal aliens like the petitioner here, regardless of when they entered their guilty pleas. This plain congressional intent is evident from IIRIRA's general statutory framework and its comprehensive method of implementation. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997) ("The plainness or ambiguity of statutory language is to be deter-

mined by reference to the language itself, the specific context in which that language is used, *and the broader context of the statute as a whole.*" (emphasis added)).

IIRIRA § 309 fixed April 1, 1997 as IIRIRA's effective date. *See* 110 Stat. at 3009-625. While § 309 contains a general savings clause listing those aliens for whom IIRIRA does not apply as of its effective date, none of those exceptions are relevant here. *See* § 303(b)(2), 110 Stat. at 3009-586; § 242(g), 8 U.S.C. § 1252(g); § 306(c), 110 Stat. at 3009-612; §§ 308(d)(2)(D) & (d)(5), 110 Stat. at 3009-617, 619. Moreover, Congress, intending that IIRIRA be a complete break from the past, enacted transitional provisions that would operate during a phase-in period ending on IIRIRA's effective date. *See Calcano-Martinez v. Reno*, Civ. Nos. 98-4033, 98-4214, 98-4246, at [50a-54a] (describing IIRIRA's transitional rules). This legislative scheme of transitional provisions followed by permanent legislation can be reduced to one essential point relevant to IIRIRA's repeal of § 212(c): Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997, except where it expressly exempted those provisions that were not meant to apply as of that date. The provision repealing § 212(c) was not one of them. Included in the provisions generally effective as of April 1, 1997 is § 304(b), repealing § 212(c), and § 304(a), replacing § 212(c) with new provisions entitled "Cancellation of Removal." *See* § 304, 110 Stat. at 3009-594-97. The new cancellation of removal proceedings exclude specified classes of criminal aliens, including the petitioner here, from seeking discretionary relief.

Congress could not have been more express about its intent to have IIRIRA apply to all aliens against whom deportation or removal proceedings were not yet pending as of April 1, 1997. *See generally* § 309. If, as petitioner necessarily concedes, it is IIRIRA and not the old INA that subjects him to removal, then it is IIRIRA's provisions that provide for the limits of judicial review and for cancellation of removal proceedings. I need look no farther to find that Congress made express its intention to disallow the relevant aliens against whom removal proceedings were filed after April 1, 1997 from seeking the protection of § 212(c) relief. Because petitioner falls generally within IIRIRA's provisions, he is subject to IIRIRA's "Cancellation of Removal" proceedings—from which, because of his criminal past, he is expressly excluded—and does not have access to § 212(c) relief.

The majority discounts this argument, suggesting that it is based on nothing more than the statute's effective date and that such reasoning is impermissible because of the pronouncement in *Landgraf* that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. But the Court's statement in *Landgraf* is inapplicable here. Changes to the Civil Rights Act of 1991, at issue in *Landgraf*, created new rights of employees "to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964," *id.* at 247, and the Court had to decide only whether a Title VII plaintiff whose suit was on appeal when the 1991 Act was enacted should be retroactively entitled to the Act's punitive damages provisions. In that context, the

fact that the 1991 Act was enacted on November 21, 1991 did not help the Court to decide whether it was intended to apply to claims predating the Act. But here, where the entirety of the new IIRIRA applies generally to the petitioner— indeed, if it did not, he would not be subject to removal at all—IIRIRA's complex provisions governing its effective dates are squarely relevant to determining the extent of IIRIRA's application as to him. In my view, these provisions plainly provide that petitioner is not entitled to § 212(c) relief.

The awkward statutory patchwork sewn together by the majority from scraps of IIRIRA and the former INA reveals Congress could not have intended the majority's conclusion. The majority's opinion faces insurmountable hurdles even on a linguistic level. The petitioner here is subject to removal under the new IIRIRA. With this opinion, the majority has permitted petitioner access to a waiver of deportation hearing under § 212(c) that was part and parcel of a statutory scheme that no longer exists. Under IIRIRA, there is no such thing as deportation that can be waived. In order to reach the result they want, the majority has effectively taken a provision that they like from a statute that has been substantially replaced, and grafted it onto the replacement.

Insofar as the *Landgraf* presumption against retroactivity is a canon of construction that permits us to divine the intent of Congress, I cannot concur in a conclusion that flies so indisputably in the face of Congress's express denial of cancellation of removal hearings for this alien. Combined with what I think are compelling expressions of Congress's actual intent to

repeal § 212(c) retroactively as to the broader class of criminal aliens described in IIRIRA § 304, I respectfully dissent from my colleagues' view that § 304 may only be applied prospectively to pleas antedating IIRIRA's enactment.

Because Congress's intent is plain on the face of the statute, I see no reason to reach the second step of the *Landgraf* analysis which requires us to determine whether IIRIRA's provisions governing cancellation of removal have genuine retroactive effect. Nevertheless, if I were to reach *Landgraf's* second step, I would conclude that provisions denying cancellation of removal do not operate retroactively. I believe that analysis of this question should be governed by cases arising in the context of the substantially analogous 1990 amendment to the INA.

The 1990 amendment limited the relief afforded by § 212(c)'s waiver of deportation by excluding aggravated felons who were sentenced to terms of imprisonment of at least five years. In holding that the 1990 amendment did not have a retroactive effect, the Ninth Circuit persuasively held that "[c]ongressional repeal of a discretionary power to relieve an alien from deportation does not attach any new legal consequences to the pre-enactment events." *Samaniego-Meraz v. INS*, 53 F.3d 254, 256 (9th Cir. 1995). As in the present case, "the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation." *Scheidemann v. INS*, 83 F.3d 1517, 1523 (3d Cir. 1996). "In general, the concern regarding retroactive application of statutes is the deprivation of rights without notice and fair warning;

such concerns are not present in this case . . . . In this case, Congress did not attach additional consequences [to past criminal activity] but merely withdrew a previously available form of discretionary relief." *Id.* (quoting *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)) (alterations in original). True retroactivity would occur if IIRIRA revoked § 212(c) relief from those who had received it prior to IIRIRA's effective date. IIRIRA § 304(b), like the 1990 amendment, "is not made retroactive merely because it applies to convictions for aggravated felonies before that time. The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief." *De Osorio*, 10 F.3d at 1042.

As of IIRIRA's April 1, 1997 effective date, Congress plainly changed the category of aliens who thereafter may seek cancellation of removal, and I disagree that the new scheme has a genuinely retroactive effect. Accordingly, I would conclude that the *Landgraf* presumption against retroactivity has no effect on our analysis. In the absence of any such presumption against retroactivity, our more traditional tools of construction apply, including the usual deference afforded to agency interpretations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, even were I to agree that the temporal reach of § 304(b) is ambiguous, I still believe that petitioner here would not be entitled-to withholding of deportation or cancellation of removal proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 98-4033, 98-4214, 98-4246

DEBORIS CALCANO-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

SERGIO MADRID, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

FAZILA KHAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Decided: Sept. 1, 2000]

Before: OAKES, WALKER, and KEITH,*
Circuit Judges.

OAKES, *Senior Circuit Judge*:

The consolidated cases before the Court require us to interpret the effect of the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), on the jurisdiction of federal courts to hear challenges raised by criminal aliens with respect to removal proceedings commenced by the Immigration and Naturalization Service ("INS"). In three opinions handed down in the last three years, we considered the effect of various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the transitional rules of IIRIRA on a federal court's jurisdiction to review removal proceedings. This is our first occasion to examine the effect of IIRIRA's permanent rules in the same context.

In enacting the AEDPA and IIRIRA in 1996, Congress reworked the role of the courts in immigration decisions by severely limiting judicial review of final orders of deportation for certain classes of aliens. By enacting these laws, Congress clearly meant to speed the removal of legal permanent residents convicted of certain crimes from the United States by curtailing the availability of judicial review of their removal orders. *See* H. R. Rep. No. 104-879 at 251-61 (1997), 1997 WL 9288; H.R. Conf. Rep. No. 104-828, at 495-507 (1997),

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

1997 WL 563320. In our first decision interpreting Congress's 1996 amendments, we held that the AEDPA "repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain criminal offenses]." *Hincapie-Nieto v. INS*, 92 F.3d 27, 28 (2d Cir. 1996). Two years later, we held that under the transitional rules of IIRIRA, federal courts retained habeas jurisdiction under 28 U.S.C. § 2241. *See Jean-Baptiste v. Reno*, 144 F.3d 212, 220 (2d Cir.), *reh'g denied*, 175 F.3d 226 (2d Cir. 1998). Four months after our decision in *Jean-Baptiste*, we examined the scope of the remaining habeas review and held that federal courts retained jurisdiction to review statutory and constitutional challenges to deportation orders. *See Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999).

The three petitioners before us, Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan, are legal permanent residents of the United States who have been ordered deported because of prior criminal convictions. Each has filed a petition for review in this Court pursuant to INA § 242(a)(2), codified at 8 U.S.C. § 1252(a)(2), challenging the final orders of removal entered against them by the Board of Immigration Appeals ("BIA"). Each petitioner has also filed a petition for habeas corpus in a United States district court. The petitions of Calcano-Martinez and Madrid were dismissed without prejudice to refiling after this Court's mandate in the present case, and Khan's petition is pending in the Eastern District of New York. On appeal, the petitioners do not dispute that they are aliens with criminal convictions that render them deportable under the Immigration and Naturalization

Act ("INA"). Rather, they raise statutory challenges to the Attorney General's interpretation of the immigration laws under which they face deportation and constitutional challenges to the statute itself.

The INS argues that this Court does not have jurisdiction to hear these petitions. We hold, for the reasons set forth herein, that INA § 242(a)(2)(C) bars this Court from reviewing claims against final orders of removal filed by certain classes of criminal aliens, including the petitioners. We also hold that IIRIRA's permanent rules do not repeal a federal court's jurisdiction to review criminal aliens' removal orders by writ of habeas corpus under 28 U.S.C. § 2241. In doing so, we follow decisions by the Third and Ninth Circuit Courts of Appeals and the principles set forth in our prior cases interpreting the immigration laws. Accordingly, we dismiss the petitions without prejudice to the same claims being brought pursuant to habeas petitions.

I. BACKGROUND

A. Deboris Calcano-Martinez.

Deboris Calcano-Martinez is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1971, when she was three years old. She has four children who are United States citizens. On October 9, 1996, Calcano was sentenced to one to three years' imprisonment based on her April 24, 1996, guilty plea to attempted criminal sale of heroin in the third degree, in violation of §§ 110 and 220.39 of the New York Penal Law.

On June 16, 1997, the INS commenced removal proceedings against Calcano-Martinez by filing a Notice to Appear. *See* 8 C.F.R. § 239.1(a) (1999). The notice charged that Calcano-Martinez's narcotic conviction rendered her deportable from the United States pursuant to INA §§ 237(a)(2)(A)(iii) and (a)(2)(B)(i), codified at 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i) (1999), as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law.[9]

A removal hearing, at which Calcano-Martinez was represented by counsel, was held before an Immigration Judge ("IJ"). At the end of the hearing, the IJ ordered Calcano-Martinez deportable as charged by the INS and ruled that, based on her criminal convictions, she was statutorily ineligible for any relief from removal. Calcano-Martinez timely appealed the IJ's decision to the BIA. The BIA dismissed her appeal. On January 29, 1998, Calcano filed a petition for review in this Court. On October 13, 1999, Calcano filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *See Calcano-Martinez v. Reno*, No. 99 Civ. 10481 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Calcano's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

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[9] INA § 237(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(B)(i) states that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

B. Sergio Madrid.

Sergio Madrid is a native and citizen of Mexico who remained in the United States unlawfully until his status was adjusted to lawful permanent resident of the United States at the age of seventeen. On September 6, 1994, Madrid was sentenced to a prison term of four years to life based on his conviction for the criminal sale of a controlled substance in the second degree, in violation of § 220.41 of the New York Penal Law.

On June 24, 1997, the INS commenced removal proceedings against Madrid by filing a Notice to Appear. The notice charged that Madrid's narcotic conviction rendered him deportable from the United States as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i); 8 U.S.C. § 1101(a)(43).[10] A removal hearing was held before an IJ and at the close of the hearing, the IJ rendered Madrid deportable. Madrid appealed the BIA's decision and on May 4, 1998, the BIA dismissed his appeal. On June 4, 1998, Madrid filed a petition for review in this Court. On October 13, 1999, Madrid filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *Madrid v. Reno*, No. 99 Civ. 10482 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Madrid's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

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[10] INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43), defines "aggravated felony" as a crime involving "illicit trafficking in a controlled substance."

C. Fazila Khan.

Fazila Khan is a native and citizen of Guyana who was admitted to the United States as a lawful permanent resident on September 2, 1987. Khan's family, including her mother and sister as well as five of her aunts and uncles, are also United States citizens. She also has a four-year-old daughter who is a United States citizen. On February 13, 1997, Khan was sentenced to a prison term of four months, to be followed by a period of supervised release for one year, in connection with her November 6, 1996, guilty plea to the use of a telephone to facilitate the distribution of heroin in violation of 21 U.S.C. §§ 843(b), (d).

In May 1997, the INS commenced removal proceedings against Khan by filing a Notice to Appear. The notice charged that her offense rendered her deportable as an alien convicted of an aggravated felony. *See* INA § 237(a)(2)(A)(iii), codified at 8 U.S.C. § 1127(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(B).

A removal hearing was held before an IJ and Khan, represented by counsel, denied that she was deportable as charged. On July 24, 1997, the IJ ordered her deportable. Khan timely appealed the IJ's decision. On May 28, 1997, the BIA issued a decision dismissing Khan's appeal. On June 29, 1998, Khan filed a petition for review in this Court. On October 13, 1998, Khan also challenged her removal order by filing a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. *Khan v. Reno*, No. CV 99-6515 (E.D.N.Y. filed Oct. 13, 1999). That petition is pending.

D. INA § 212(c) Waiver from Deportation.

Under former INA § 212(c), codified at 8 U.S.C. § 1182(c) (1996), the Attorney General had discretionary authority to waive the deportation of an alien deportable because of a prior conviction where deportation would cause extraordinary hardship to the deportee or his or her family. The permanent rules of IIRIRA, effective April 1, 1997, repealed § 212(c) in its entirety and replaced it with another form of relief entitled "cancellation of removal," found at new INA § 240A, codified at 8 U.S.C. § 1229b (1999). *See* IIRIRA §§ 304(a), (b), 110 Stat. at 3009-587-594. That relief, permitting the Attorney General to waive deportation for certain classes of aliens, is categorically not available to an alien convicted of a crime that qualifies as an "aggravated felony" under the statute. *See id.* The petitioners are each ineligible for "cancellation of removal" because their convictions qualify as "aggravated felonies" under the INA. *See* INA § 240A, codified at 8 U.S.C. § 1229b (1999); 8 U.S.C. § 1101(a)(43).

In their petitions for review to this Court, the petitioners argue that the BIA erred by interpreting IIRIRA § 304's repeal of § 212(c) relief and replacement with "cancellation of removal" to apply retroactively to an alien who is convicted before April 1, 1997, the effective date of IIRIRA § 304(a).[11] The petitioners further contend that if IIRIRA is interpreted to apply retroactively to pre-enactment convictions, § 304(a) of IIRIRA is unconstitutional because it violates their

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[11] At argument, counsel for the petitioners alternatively argued that IIRIRA §§ 304(a), (b) should not apply retrospectively to guilty pleas entered to deportable crimes prior to IIRIRA's effective date.

rights guaranteed under the due process and equal protection clauses of the U.S. Constitution.

II. DISCUSSION

We must consider whether we have jurisdiction over the petition before us. Implicit in this question is whether IIRIRA's permanent rules repealed habeas corpus jurisdiction to review final removal orders entered against a legal resident alien who is removable because of a prior conviction. *See Liang v. INS*, 206 F.3d 308, 312-13 (3d Cir. 2000) (noting the interrelationship between jurisdiction over a petition for review and habeas corpus). The permanent rules of IIRIRA are Congress's most recent enactment, in a line of many, on the subject of the judicial review available over immigration decisions. A complete discussion of the history of judicial review of immigration orders is set forth in this Court's decision in *Henderson*, 157 F.3d at 112-17. For our purposes on this appeal, it is necessary to begin with the 1996 amendments to the INA.

A. The AEDPA.

In April of 1996, Congress enacted the AEDPA, which included two provisions relevant to the judicial review of immigration decisions. Prior to the enactment of the AEDPA, INA § 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10) (1996). Section 401(e) of the AEDPA, entitled "Elimination of Custody Review by Habeas Corpus," explicitly repealed prior INA § 106(a)(10). *See* AEDPA § 401(e), 110 Stat. at 1268. Section 440(a) was enacted to replace the repealed provision and substitute the following language:

> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

AEDPA § 440(a), 110 Stat. at 1276-77, codified at 8 U.S.C. § 1105a(a)(10) (1996) (repealed by IIRIRA § 306(b), 110 Stat. at 3009-612, September 30, 1996, with respect to deportation proceedings commenced after April 1, 1997).

In *Hincapie-Nieto*, 92 F.3d at 29-30, we held that § 440(a) repealed a court of appeals's pre-existing jurisdiction over petitions for review filed by aliens ordered deported because of the convictions specified. In holding that our jurisdiction over a petition for review was repealed, we noted that "[t]he absence of an opportunity for some aliens to file a petition for review in a court of appeals does not necessarily mean . . . that the federal courts are closed to all claims by such aliens arising in the course of deportation proceedings." *Id.* at 30. In *Hincapie-Nieto*, it was not necessary to determine whether district courts continued to have 28 U.S.C. § 2241 habeas jurisdiction over final deportation orders after the AEDPA. In dicta, however, we stated that no constitutional infirmity appeared to arise from AEDPA § 440(a)'s repeal of our jurisdiction because the INS assured that at least some avenue for judicial relief remained available through a challenge to detention by application for habeas corpus. *See id.* at 30-31.

Our suggestion in *Hincapie-Nieto* that AEDPA § 440(a)'s bar of judicial review under the INA was constitutional because courts might review deportation orders through habeas corpus petitions was in accord with the vast majority of courts of appeals to consider the same issue. *See Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Mendez-Morales v. INS*, 119 F.3d 738, 739 (8th Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-4 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 (10th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668-70 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996); *Salazar-Haro v.* INS, 95 F.3d 309, 311 (3d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

B. IIRIRA's Transitional Rules.

Five months after enacting the AEDPA, on September 30, 1996, Congress enacted IIRIRA, which further narrowed judicial review for legal residents ordered removable because they were convicted of certain crimes. IIRIRA contains two sets of provisions. The transitional rules (which are not codified in the U.S. Code) control deportation proceedings commenced prior to April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. Section 309(c)(4)(G) of IIRIRA's transitional rules is the successor to AEDPA § 440(a) and provides in more absolute language that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [the deportation proceedings of the INA]." IIRIRA § 309(c)(4)(G), 110 Stat. at 3009-626, codified at 8 U.S.C. § 1101 note (1999).

In addition, IIRIRA § 306(a) amends INA § 242(g) to provide:

> **Exclusive Jurisdiction.** Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

IIRIRA § 306(a), 110 Stat. at 3009-612, codified at 8 U.S.C. § 1252(g) (1999). Although INA § 242(g) is listed with the permanent provisions, IIRIRA § 306(c) makes § 242(g) applicable to both transitional and permanent rules cases. *See* IIRIRA § 306(c), 110 Stat. at 3009-612.

In *Jean-Baptiste*, 144 F.3d at 214-18, this Court considered whether INA § 242(g) divested federal courts of jurisdiction over a case where legal residents, ordered deported because of a criminal conviction, maintained that their right to due process was violated because they had never been given notice that their criminal conviction could subject them to consequences under the immigration laws. Finding that plaintiffs' claims arose out of "the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," this Court held that INA § 242(g) deprived federal courts of jurisdiction to hear plaintiffs' claims. *See id.* at 218.

We reasoned, however, that all review had not been eliminated by INA § 242(g) or the AEDPA. *See id.* Relying on the doctrine articulated in *Felker v. Turpin*, 518 U.S. 651, 659-61, 116 S. Ct. 2333, 135 L.Ed.2d 827

(1996), that repeal by implication of the right to petition for habeas corpus relief is disfavored, we held that:

> Nothing in the language of either the [AEDPA] or [IIRIRA] suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus. Those two Acts therefore do not specifically exclude habeas review in deportation cases under § 2241 . . . .

Id. at 219. Therefore, in *Jean-Baptiste*, this Court concluded that the AEDPA and IIRIRA's transitional rules did not repeal the habeas jurisdiction granted to federal courts by Congress in 28 U.S.C. § 2241 to review challenges to final deportation orders. We left open the question of the scope of the habeas review of immigration decisions available under 28 U.S.C. § 2241. *See id.* at 220.

Our decision in *Jean-Baptiste* is in accord with the majority of circuits also to hold that the language of § 242(g) did not repeal habeas jurisdiction over immigration decisions. The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals held that habeas jurisdiction to review final deportation decisions survived the AEDPA and IIRIRA transitional rules' streamline of the judicial review available under the INA. *See Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999); *Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999); *Requena-Rodriquez v. Pasquarell*, 190 F.3d 299, 306 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1145-46 (10th Cir. 1999), *cert. denied*, *Palaganas-Suarez v. Greene*,

— U.S. ——, 120 S. Ct. 1539, 146 L.Ed.2d 352 (2000); *Shah v. Reno*, 184 F.3d 719, 723-24 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 236-37 (3d Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 119-23 (1st Cir. 1998), *cert. denied, Reno v. Goncalves*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999). Only the Seventh Circuit has held that the transitional rules of IIRIRA effected a repeal of habeas jurisdiction over final deportation orders. *See LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied, Reno v. LaGuerre*, — U.S. ——, 120 S. Ct. 1157, 145 L.Ed.2d 1069 (2000).

In *Henderson*, 157 F.3d at 118-22, we reaffirmed our synthesized holding of *Hincapie-Nieto* and *Jean-Baptiste* that under the INA, modified by the AEDPA and IIRIRA's transitional rules, an alien ordered deported because of a criminal conviction cannot seek a petition for review in the court of appeals but must pursue a claim in a habeas proceeding pursuant to 28 U.S.C. § 2241. Although the panel questioned the wisdom of having the channel for review be by habeas in the district court rather than by petition for review in the courts of appeals, it acknowledged that it was bound by a reasonable comprehension of the statute and Second Circuit precedent. *See id.* at 119 n.9; *see also Jean-Baptiste*, 175 F.3d at 226 (denying a subsequent petition for rehearing despite the *Henderson* panel's questioning).

We also considered in *Henderson* the breadth of review available under habeas corpus, the question left open after *Jean-Baptiste*. The INS argued that review only of "substantial" constitutional claims remained and

that the courts were without power to review the Attorney General's interpretation of the immigration laws. *See Henderson*, 157 F.3d at 119-20. We soundly rejected the INS's argument and held that federal courts have jurisdiction under 28 U.S.C. § 2241 to consider all claims that are purely legal in nature—including constitutional challenges and claims that the Attorney General misinterpreted the immigration laws. *See id.* at 122.

C. IIRIRA's Permanent Rules.

The permanent rules of IIRIRA govern deportation proceedings initiated after April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. The parties agree that because deportation proceedings were not initiated against any of the petitioners until after April 1, 1997, the permanent rules apply to their cases. The permanent rules revamp the INA by striking 8 U.S.C. § 1105(a) in its entirety and relocating the rules governing judicial review of deportation orders to 8 U.S.C. § 1252. *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612.

The INS argues that the court of appeals is the exclusive forum for all immigration matters, invoking several provisions of the permanent rules in support of its position that IIRIRA, in its final form, divests district courts of their habeas jurisdiction. The INS calls our attention to newly added INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), 242(g) and 242(b)(9). *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612. Section 242(a)(1) of the INA provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28 [the Hobbs Act] . . . .

8 U.S.C. § 1252(a)(1) (1999). The INS argues that because the Hobbs Act gives exclusive jurisdiction to the court of appeals, *see* 28 U.S.C. § 2342 ("The court of appeals . . . has exclusive jurisdiction" over specified agency orders), § 242(a)(1) evidences Congress's intent to eradicate habeas review.

Section 242(a)(2)(C) of the INA is the successor to AEDPA § 440(a) and IIRIRA § 309(c)(4)(g) and in its final form now states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [the deportation sections of the INA].

8 U.S.C. § 1252(a)(2)(C) (1999). The INS argues that when it added the "notwithstanding any other provision of law" phrase to the final incarnation of this section, Congress explicitly repealed habeas jurisdiction.

The INS also relies on INA § 242(e)(2). This section provides:

> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157, or has been granted asylum under section 1158, such status not having been terminated, and is entitled to such

> further inquiry as prescribed by the Attorney General pursuant to section 12255(b)(1)(C) of this title.

8 U.S.C. § 1252(e)(2) (1999). The INS contends that because INA § 242(e)(2) provides for statutory habeas review under the delineated circumstances, Congress knew how to create habeas review under the INA when it so desires. It follows, according to the INS, that Congress's decision to omit analogous language in regard to an alien's challenge to his or her final deportation order demonstrates its intent that this review be unavailable.

The INS additionally points to INA § 242(g), a section already considered by this Court in *Henderson*. Section 242(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

8 U.S.C. § 1252(g) (1999).

Finally, § 242(b)(9), upon which the INS rests its principal argument provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter

> shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (1999). The INS argues that because INA § 242(b)(2) requires that all petitions for review "be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," § 242(b)(9) necessarily divests any court of jurisdiction other than the appropriate court of appeals. In support of this argument, the INS points to the Supreme Court's recent characterization in dicta of § 242(b)(9) as a "zipper clause" that channels all review of removal decisions under the INA into the court of appeals. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999) ("AADC").

Four courts of appeals have considered arguments similar to those presented by the INS in this case. The Fifth and Eleventh Circuit Courts of Appeals adopted the INS's position; the Third and Ninth rejected it.

In *Richardson v. Reno*, 180 F.3d 1311, 1312-13 (11th Cir. 1999) ("*Richardson II*"), *cert. denied, Richardson v. Reno*, ___, U.S. ___, 120 St. Ct. 1529 (2000), the Eleventh Circuit reaffirmed its holding in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) ("*Richardson* I"), after reconsideration in light of the Supreme Court's decision in *AADC*, that IIRIRA's permanent rules eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings. The court held that INA § 242(b)(2), § 242(e)(2) and the AEDPA's elimination of habeas review in § 401(e) evidenced Congress's intent to preclude statutory habeas review over immigration decisions. *See id.* at 1314.

More specifically, the court held that INA § 242(b)(9) and the Supreme Court's description of that section in *AADC* as a "zipper clause" that channels judicial review of immigration decisions exclusively into that provided by the INA, was evidence that Congress intended to repeal all habeas review. *See id.* at 1314-15. The court concluded that the repeal of habeas jurisdiction to review immigration decisions is not unconstitutional because judicial review still remains under INA § 242(a)(2)(C) to determine whether the petitioner is an alien, is deportable, and deportable for a reason covered by INA § 242(a)(2)(C). *See id.* at 1315-16. Furthermore, the court said, review of substantial constitutional questions and challenges to the constitutionality of the INA itself remains available because INA § 242(a)(2)(C) does not literally foreclose constitutional challenges to the statute itself. *See id.* at 1316 n.5.

In *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000), the Fifth Circuit followed the lead of the Eleventh Circuit and agreed with the INS that 28 U.S.C. § 2241 habeas jurisdiction had been repealed by IIRIRA's permanent rules. According to the Fifth Circuit, Congress need not explicitly mention habeas jurisdiction generally or § 2241 by name to repeal habeas jurisdiction. *See id.* at 199 ("While Congress could theoretically have been more explicit by specifically mentioning habeas corpus in general or § 2241 in particular, we believe the jurisdictional limitation described throughout § 1252 was sufficiently explicit."). Accordingly, the court reasoned that, unlike the language in IIRIRA's transitional rules, the jurisdiction-stripping provisions in the permanent rules, beginning with the far more preclusive language "notwithstanding

any other provisions of law," explicitly repealed § 2241 habeas jurisdiction over immigration decisions. *Id.* at 198. The Fifth Circuit, like the Eleventh Circuit, reasoned that the repeal was not unconstitutional because sufficient judicial review remained available for criminal aliens' challenges against removal under INA § 242(a)(2)(C). *See id.* at 199-201. It did not go as far, however, as the Eleventh Circuit to hold that review of constitutional and statutory claims were preserved. It held instead that the court of appeals retains jurisdiction under § 242(a)(2)(C) only to determine whether the prerequisites for precluding review are met, whether the provisions classifying the petitioner in a specific criminal category are constitutionally applied, and whether the level of judicial review remaining in a particular case satisfies the Constitution. *See id.*

In *Liang v. INS*, 206 F.3d 308, 316-18 (3d Cir. 2000), the Third Circuit parted ways with the Fifth and Eleventh Circuits, holding that because none of the sections in § 1252 expressly refers to habeas jurisdiction or to § 2241, none expressly revoked habeas jurisdiction. The court reasoned that the Supreme Court did not, in *AADC*, decide that § 242(b)(9) radically eliminated habeas jurisdiction because that was not the issue raised in that case, and the Supreme Court explicitly noted that courts were in disagreement whether habeas jurisdiction remained after IIRIRA. *See id.* at 319. The Third Circuit also disagreed with the Fifth and Eleventh Circuits' conclusion that sufficient judicial review remained under § 242(a)(2)(C) so that the repeal of habeas was not unconstitutional, and continued to adhere to its earlier ruling in *Sandoval*, 166 F.3d 225, that the language of § 242(a)(2)(C) makes clear that the court of appeals lacks jurisdiction over

petitions of review filed by aliens removable because of prior convictions. *See id.* at 321. Because no judicial review of criminal aliens' statutory and constitutional claims remains under § 242(a)(2)(C), the court concluded that a repeal of habeas jurisdiction over immigration decisions raises serious constitutional questions. *See id.* at 321-22.

The Ninth Circuit, following the lead of the Third Circuit, held that IIRIRA's permanent rules do not use language explicit enough to repeal a federal court's habeas jurisdiction to review final removal orders. *See Flores-Miramontes v. INS*, 212 F.3d 1133, 1137-38 (9th Cir. 2000). The court reasoned that although the language of the permanent rules is stronger than that of the transitional provisions, the difference would not cause it to depart from its decision in *Magana-Pizano*, 200 F.3d 603, to find a repeal of 28 U.S.C. § 2241 jurisdiction over final removal orders. *See Flores-Miramontes*, 212 F.3d at 1137. Furthermore, the court held that § 242(b)(9) and the Supreme Court's remarks about that provision did not require the conclusion that habeas review is repealed. *See id.* at 1139. Finally, the court found that an interpretation that IIRIRA does not repeal habeas jurisdiction avoids a substantial constitutional question. *See id.* at 1141-42. In so doing, it rejected the INS's argument that review of substantial constitutional claims remained in the court of appeals under a petition for review. *See id.* at 1142.

We are persuaded by the Third and Ninth Circuits' reasoning in *Liang v. INS* and *Flores-Miramontes v. INS* that Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders. We conclude that the

scope of this review includes statutory claims such as those raised by the petitioners in this case. We do not read any exceptions into INA § 242(a)(2)(C) that bars our jurisdiction over petitions to review removal orders against aliens convicted of certain crimes. It is also our view that our preservation of habeas jurisdiction under the permanent rules avoids the novel and profound constitutional questions that would arise were we to find that IIRIRA eliminates habeas jurisdiction over final immigration decisions.

We will not strain to infer that Congress radically repealed the federal courts' habeas jurisdiction to review final orders of removal. In *Felker*, 518 U.S. at 657, the Supreme Court considered whether Title I of the AEDPA, a statute limiting the right to file successive habeas petitions that specifically provided that a court of appeals's decision denying leave to file a successive petition could not be appealed or be the subject of a petition for rehearing or petition for *certiorari*, *see* 28 U.S.C. § 2244(b)(3)(E), deprived it of jurisdiction to entertain an original application for habeas relief. The Court concluded that because no provision of Title I explicitly mentioned its authority to entertain original habeas petitions, it would not find a repeal of habeas jurisdiction by implication. *See id.* at 660-61. In so holding, the Court restated its rule developed more than a century earlier in *Ex Parte Yerger*, 8 Wall. 85, 75 U.S. 85, 19 L.Ed. 332 (1868), that repeals of jurisdictional statutes by implication are not favored. *See Felker*, 518 U.S. at 660. This rule requires that a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name.

In *Jean-Baptiste*, 144 F.3d at 220, we determined that although the AEDPA and IIRIRA's transitional rules eliminated habeas corpus review under INA § 106(a)(10), neither specifically discussed 28 U.S.C. § 2241 or habeas jurisdiction generally. Following the rule articulated in *Felker*, we held that Congress did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *See id.* In order to find habeas jurisdiction eradicated, our precedent thus requires an explicit statement from Congress that mentions a repeal of habeas jurisdiction. The majority of other circuit courts have also held that Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it. *See Flores-Miramontes*, 212 F.3d at 1137; *Liang*, 206 F.3d at 320; *Magana-Pizano*, 200 F.3d at 608-09; *Pak*, 196 F.3d at 673; *Bowrin*, 194 F.3d at 489; *Jurado-Gutierrez*, 190 F.3d at 1145-46; *Shah*, 184 F.3d at 724; *Goncalves*, 144 F.3d at 119; *but see LaGuerre*, 164 F.3d at 1038-39.

Nothing in IIRIRA's permanent provisions requires us to stray from our determination in *Jean-Baptiste* that habeas review survives IIRIRA. Although the language is arguably more restrictive, there is still nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241. Although each new provision works to narrow or limit the judicial review available to the criminal aliens under the INA, INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), and 242(g)[12] do not

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[12] Indeed, the INS's argument that INS § 242(g) repeals § 2241 habeas jurisdiction over final deportation orders is foreclosed by the Supreme Court's decision in *AADC*, interpreting § 242(g) to

explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241. *See* 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), (e)(2), and (g) (1999). Judicial review and habeas corpus have distinct technical meanings under the law. *See Heikkila v. Barber*, 345 U.S. 229, 235-36, 73 S. Ct. 603, 97 L.Ed. 972 (1953); *see also Flores-Miramontes*, 212 F.3d at 1140 (citing *Sandoval*, 166 F.3d at 235). We will not infer that Congress meant to repeal habeas corpus review under 28 U.S.C. § 2241 when it mentioned only judicial review, a distinct and separate concept from habeas.

Felker's requirement that Congress provide an explicit statement in order to repeal habeas jurisdiction is particularly relevant in this case. As the Ninth Circuit pointed out, *Felker* was decided three months before IIRIRA became law. We assume that Congress is aware of the law, *see U.S. v. Georgopoulos*, 149 F.3d 169, 172 (2d Cir. 1998) (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990)), and therefore aware of *Felker*'s mandate when it considered the transitional and permanent rules of IIRIRA. *See Flores-Miramontes*, 212 F.3d at 1139. Had Congress intended that the avenue of review available under 28 U.S.C. § 2241 be repealed, it knew to use more explicit language than it chose.

The INS rests heavily on the phrase "notwithstanding any other provision of law" added to INA § 242(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C) (1999). However, we were not persuaded that the same exact phraseology repealed § 2241 habeas jurisdiction

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apply only to the three discrete immigration decisions identified in the section. *See* 525 U.S. at 482.

when, in *Jean-Baptiste*, we examined the effect on habeas jurisdiction of INA section 242(g). *See* 144 F.3d at 218. Other courts of appeals have also held that the "notwithstanding" language was not strong enough to repeal habeas jurisdiction. *See Sandoval*, 166 F.3d at 236; *Goncalves*, 144 F.3d at 122. Our holding and our application of it in *Jean-Baptiste* controls our interpretation of the permanent rules and requires a conclusion that the permanent rules do not divest federal courts of jurisdiction to review a criminal alien's legal challenge to his or her removal order.

As for the INS's reliance on § 242(b)(9), we first recognize that § 242(b)(9) does not expressly mention habeas jurisdiction or § 2241. INA § 242(b)(9) is a congressional limitation on judicial review and does not concern habeas jurisdiction. Thus, under *Felker* and our decision in *Jean-Baptiste*, § 242(b)(9) does not constitute a repeal of habeas corpus.

Furthermore, we are not persuaded by the INS that the Supreme Court's characterization of INA § 242(b)(9) as a "zipper clause" requires us to hold that it effects a repeal of habeas jurisdiction. In *AADC*, a group of temporary residents, who belonged to the Popular Front for the Liberation of Palestine, sought injunctive and declaratory relief on the ground that the INS was selectively enforcing the immigration laws against them in violation of their First and Fifth Amendment rights. *See* 525 U.S. at 473-74. The INS sought to dismiss the case for lack of jurisdiction, arguing that INA § 242(g), made applicable to the case by § 306(c)(1) of IIRIRA, deprived the courts of power to hear the appeal. *See id.* at 475. The Supreme Court agreed with the INS that INA § 242(g) deprived

federal courts of jurisdiction over the petitioners' selective enforcement case until the deportation orders against them became final, if ever. *See id.* at 482. The Court, however, rejected the "unexamined assumption that § 1252(g) covers the universe of deportation claims" and held that the section covered only the three discrete actions delineated by the statute: the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders. *See id.*[13] In *AADC*, the Supreme Court contrasted the narrow scope of INA § 242(g) with INA § 242(b)(9), which it described as an "unmistakable zipper clause" that channels judicial review of all immigration-related decisions and actions to the court of appeals. *Id.* at 482-83.

The Court's description of INA § 242(b)(9) as a "zipper clause" that "channels judicial review" of immigration decisions to the court of appeals was not a holding that § 242(b)(9) divests federal courts of § 2241 habeas jurisdiction. The discussion of § 242(b)(9) in *AADC* pertained to whether § 242(g) was redundant of § 242(b)(9). By interpreting § 242(g) narrowly, the Supreme Court held that the apparent redundancy was a "mirage." *Id.* at 482. Far from deciding the question what habeas relief remained after IIRIRA, the Court chose not to address the question. *See id.* at 480 n.7 (noting disagreement among the courts of appeals). To repeat, that case did not concern a habeas petition but

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[13] The Supreme Court thus held that INA § 242(g) applies in a very narrow class of cases. This holding is contrary to our interpretation of that section in *Jean-Baptiste* where we assumed that it governed in the case before us. This distinction has no bearing, however, on our holding in *Jean-Baptiste* that the language of § 242(g) was insufficient to repeal § 2241.

was a case brought under a federal court's federal question subject matter jurisdiction. *See id.* at 474. Therefore, "that case does not require a conclusion contrary to the rule set forth in *Felker*." *Flores-Miramontes*, 212 F.3d at 1139. Accordingly, we will not presume that the Supreme Court meant its decision in *AADC* to have the radical effect of repealing habeas jurisdiction when it declined to address the issue directly.

As the Ninth Circuit points out, our interpretation that INA § 242(b)(9) does not eradicate 28 U.S.C. § 2241 habeas jurisdiction does not render that section meaningless. *See Flores-Miramontes*, 212 F.3d at 1140. Put differently, § 242(b)(9) forces a legal resident alien in removal proceedings to save all of his or her challenges to an unlawful government decision or action until after a final removal order is issued. Congress enacted INA § 242(b)(9) for the important purpose of consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals. *See id.* at 1141. Before INA § 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition. *See* 8 U.S.C. § 1252(b)(9); *Flores-Miramontes*, 212 F.3d at 1140-41. Hence, § 242(b)(9) concerns judicial review in a civil action brought under 28 U.S.C. § 1331 rather than review under habeas corpus. Finally, our interpretation of IIRIRA's permanent rules as preserving

28 U.S.C. § 2241 habeas jurisdiction allows us to avoid the serious constitutional question that a repeal of habeas jurisdiction over removal proceedings involving criminal aliens would raise under the Constitution. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) (interpreting a federal statute to avoid a serious constitutional question presented where the statute appeared to foreclose review of constitutional claims); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L.Ed. 688 (1936) (Brandeis *J.*, concurring) (same). The Suspension Clause mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require." U.S. Const. art. 1, § 9, cl. 2. Just recently, Justice Stevens, writing for the Supreme Court majority, remarked that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, — U.S. ——, 120 S. Ct. 1595, 1603, 146 L.Ed.2d 542 (2000). Historically, legal permanent residents ordered removable from this country have been entitled to assert their legal rights in habeas corpus proceedings. *See e.g., Heikkila*, 345 U.S. at 230; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 12 S. Ct. 336, 35 L.Ed. 1146 (1892); *United States v. Jung Ah Lung*, 124 U.S. 621, 622-23, 8 S. Ct. 663, 31 L.Ed. 591 (1888). Indeed, non-citizens have long been permitted to raise statutory claims, similar to those raised by the petitioners before us, that are based on the executive branch's misinterpretation of the immigration laws. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-600, 73 S. Ct. 472, 97 L.Ed. 576 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-53, 70 S. Ct. 445, 94 L.Ed. 616 (1950); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9, 68 S. Ct. 374, 92 L.Ed. 433 (1948); *Delgadillo v. Carmichael*, 332

U.S. 388, 390-91, 68 S. Ct. 10, 92 L.Ed. 17 (1947); *Kessler v. Strecker*, 307 U.S. 22, 28-32, 59 S. Ct. 694, 83 L.Ed. 1082 (1939); *Mahler v. Eby*, 264 U.S. 32, 45, 44 S. Ct. 283, 68 L.Ed. 549 (1924). An interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes would therefore raise a serious constitutional question under the Suspension Clause of the Constitution.

The INS argues that a constitutional question does not arise if 28 U.S.C. § 2241 jurisdiction is repealed because the constitutionally-mandated amount of judicial review remains under the INA. Specifically, although it acknowledges the broad preclusive language of § 242(a)(2)(C) and the majority of courts' interpretation of it, *see supra* at II. A, the INS assures us that a criminal alien may still obtain review of his or her removal orders pursuant to a petition for review in a court of appeals. It argues that this review includes all that is required by the Constitution—"substantial" constitutional claims and "certain jurisdictional facts" including whether the petitioner is an alien who is removable by reason of having committed a specified criminal offense.

It is true that the Supreme Court has held that Congress may divest the district courts of habeas jurisdiction without violating the Constitution so long as it substitutes "a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L.Ed.2d 411 (1977). In accord with this principle, we heretofore have recognized the need for adequate judicial review of the legal challenges filed by

a criminal alien. We have determined that, because § 242(a)(2)(C) eradicated all review for legal residents ordered removed owing to a prior conviction, habeas review of this class of claims remains. *See Henderson*, 157 F.3d at 119; *Jean Baptiste*, 144 F.3d at 219; *Hincapie-Nieto*, 92 F.3d at 31.

The INS's interpretation of INA § 242(a)(2)(C) and its definition of what review is required by the Constitution is a misapprehension of the law, in conflict with our prior decisions, and difficult to reconcile with the INS's earlier position taken in *Hincapie-Nieto*. Although a federal court of appeals generally retains jurisdiction under INS § 242(a)(1) to review a legal resident alien's challenge to his or her final order of removal, INA § 242(a)(2)(C) excepts this review for a petition filed by a detained alien ordered removable because of a criminal conviction. *See* 8 U.S.C. § 1252(a)(2)(C). Thus, in *Hincapie-Nieto* and *Jean-Baptiste*, we interpreted § 242(a)(2)(C) as barring all review of a final order of removal entered against an alien removable because of a prior conviction. *Hincapie-Nieto*, 92 F.3d at 30; *Jean-Baptiste*, 144 F.3d at 219. Indeed, in *Hincapie-Nieto*, the INS, contrary to what it asserts here, assured the court that there was no constitutional infirmity with this interpretation because a non-citizen in executive detention could obtain judicial review of his or her deportation order by habeas corpus. *See* 92 F.3d at 31.

Furthermore, in *Jean-Baptiste*, we rejected the very same argument presented by the INS in this case. There, the INS argued that it was unnecessary to preserve habeas jurisdiction to avoid a constitutional question because review of constitutional questions re-

mained available under the INA. Relying on our prior decision in *Hincapie-Nieto*, we held that the INA as amended by IIRIRA takes away that review for legal residents ordered removable because of prior convictions. *See Jean-Baptiste*, 144 F.3d at 219-20. The INS's arguments were "not well-taken" in that case, *see id.* at 220, and are received with the same skepticism here. There is nothing in IIRIRA's permanent rules or their legislative history that indicates that Congress excepted review of substantial constitutional questions under INA § 242.

In addition, the INS's formulation of the review required by the Constitution falls short of the review that we held in *Henderson* is mandated. We found there that even a partial repeal of habeas jurisdiction to hear an executively detained alien's statutory challenges may violate the Suspension Clause. *See* 157 F.3d at 120. In that case, we reasoned that the INS's articulation of the review that is required under the Constitution:

> is drawn from the very different context of successive federal habeas corpus petitions by prisoners in state custody who have already had one or more opportunities for full judicial process and appeals in the state system, with an opportunity for further review in the Supreme Court by a writ of certiorari, and one or more opportunities for review in the federal judiciary on their first habeas petition.

Id. (*quoting Goncalves*, 144 F.3d at 118 n.8). The case of a legal permanent resident alien, in contrast, arises in the setting of executive detention, "a context in which the petitioner[ ] ha[s] never had [his or her] claim[ ] review[ed] by any court, federal or state." *Id.* In this

context, circuit courts, including this one, have noted that review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law. *See Henderson*, 157 F.3d at 121 (*citing Gegiow v. Uhl*, 239 U.S. 3, 3, 36 S.Ct. 2, 60 L.Ed. 114 (1915); *Brownell v. We Shung*, 352 U.S. 180, 182 n.1, 77 S. Ct. 252, 1 L.Ed.2d 225 (1956)); *Goncalves*, 144 F.3d at 124 (citing numerous immigration cases that have considered claims of statutory right)); *see also Mayers*, 175 F.3d at 1300 (citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78, 77 S. Ct. 618, 1 L.Ed.2d 652 (1957)); *Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L.Ed. 681 (1954)).

Furthermore, the language of 28 U.S.C. § 2241 does not contemplate that the writ only extends to a person in custody in violation of the Constitution. Rather, the statute also provides habeas jurisdiction over claims that a person is in custody in violation of federal laws and treaties. *See* 28 U.S.C. § 2241 (providing that the writ of habeas corpus shall extend to a person in custody "in violation of the Constitution or laws or treaties of the United States"). Hence, the literal terms of 28 U.S.C. § 2241 contemplate statutory claims against executive detention.

The substitution of judicial review only of substantial constitutional questions for the habeas review guaranteed under 28 U.S.C. § 2241 therefore does not cure the constitutional infirmity that could result from a repeal of the habeas statute. Without habeas jurisdiction to review final orders, there is currently no judicial review at all of a removal order issued against a non-citizen who is ordered removable because he or she committed

a certain crime. Because habeas jurisdiction is constitutionally required where the immigration laws have been interpreted to bar other forms of judicial review under § 242(a)(2)(C), our decision that habeas review remains for a criminal alien's legal challenge to his or her deportation order obviates the profound constitutional questions that would arise if we concluded that all judicial review had been eradicated.

Although not all challenges that an alien may launch against his removal are cognizable under habeas, purely legal statutory and constitutional claims are within § 2241's scope. Thus, a federal court's habeas review includes the claim raised by the petitioners in these consolidated cases—that IIRIRA does not apply to bar the availability of § 212(c) relief for convictions that occurred prior to its enactment. The petitioners challenge the government's refusal to consider an application for a waiver from deportation and do not ask the court to determine whether the BIA exercised its discretion appropriately. Their claim is a purely legal question that is cognizable under the habeas statute.

We note, as did the Third Circuit in *Liang*, that if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review. This would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review. However, we disagree with the Eleventh Circuit's interpretation of INA § 242(a)(2)(C) in *Richardson II* as permitting review of both statutory and constitutional claims. Although this interpretation may represent

sound legislative policy, we reiterate that we do not read IIRIRA or our prior cases to permit such review under INA § 242(a)(2)(C).

Notwithstanding, the question raised by the petitioners is a purely legal matter appropriate for a court, rather than the BIA, to determine. *See Mayers*, 175 F.3d at 1300; *see also Goncalves*, 144 F.3d at 113; *LaGuerre*, 164 F.3d at 1041. It is the type of question that, once answered by the highest court, is answered for all cases that follow presenting the same issue. We therefore believe our decision today that a legal resident alien's pure legal challenges are preserved via habeas corpus to his or her removal order serves to advance Congress's goal of streamlining judicial review.

III. CONCLUSION

We affirm our adherence to the proposition that had Congress intended to strip federal courts of habeas jurisdiction under 28 U.S.C. § 2241 over criminal aliens' statutory and constitutional challenges, it would have done so by making its intent explicit. Because the permanent rules do not mention a repeal of 28 U.S.C. § 2241 or habeas jurisdiction generally, we hold that they do not deprive a federal court of its habeas jurisdiction under § 2241 to review the purely legal claims of criminal aliens against final orders of removal. Because we lack jurisdiction under INA § 242(a)(2)(C) over the petitions for review brought by Calcano-Martinez, Madrid, and Khan challenging their final orders of removal, we dismiss the petitions without prejudice to Khan's pending petition or to the same claims being brought by Calcano-Martinez and Madrid under habeas corpus.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Nos. 3:99cv260 (AHN), 3:99cv772 (AHN),
3:99cv773(AHN)

ROHAN P. DUNBAR

v.

INS

GYNO DOMOND

v.

INS

ENRICO ST. CYR

v.

INS

[Aug. 30, 1999]

RULING ON PETITIONS FOR HABEAS CORPUS

The petitioners in these cases, Rohan P. Dunbar ("Dunbar"), Gyno Domond ("Domond"), and Enrico St. Cyr ("St. Cyr"), are Lawful Permanent Residents ("LPRs") of the United States currently facing deportation as a consequence of criminal acts they have committed. The Immigration and Naturalization Service ("INS") has agreed, through an oral stipulation entered into via the United States Attorney's Office for the District of Connecticut, to suspend the deportation of the petitioners pending the outcome of these actions.

In particular, the petitioners seek writs of habeas corpus compelling the INS to allow them to apply for a statutorily repealed form of discretionary relief from deportation. For the following reasons, Dunbar's petition [doc. # 1 (3:99cv260(AHN))] is GRANTED, Domond's petition [doc. # 1 (3:99cv772(AHN))] is GRANTED, and St. Cyr's petition [doc. # 1 (3:99cv773 (AHN))] is GRANTED.

BACKGROUND

On April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") (effective date April 24, 1996). Later that year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) ("IIRIRA") (transitional rules effective date October 30, 1996 and permanent rules effective date April 1, 1997). As discussed below, these acts established significant

changes in the Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1537 ("INA"), that affect, *inter alia*, (1) the jurisdiction of federal courts to review immigration decisions and (2) the relief available to aliens involved in deportation proceedings. The effects of these acts underlie the current petitions.

I. *Dunbar*

Dunbar was admitted to the United States as an LPR on March 27, 1984. Subsequently, he was convicted of assault in the second degree on January 2, 1996. As a consequence, on March 22, 1996, INS issued an Order to Show Cause which was served on Dunbar on April 18, 1996, but not filed with the Office of the Immigration Judge until May 1, 1996. An Immigration Judge ("IJ") held hearings on November 19, 1996, May 20, 1997, September 23, 1997, and January 12, 1998, and determined that Dunbar was subject to deportation as an alien who had committed an aggravated felony. Dunbar appealed to the Board of Immigration Appeals ("BIA") which dismissed his appeal on January 20, 1999. He filed the current petition for a writ of habeas corpus on February 11, 1999.

II. *Domond*

Domond entered the United States at an unknown time in the past. He obtained LPR status on August 12, 1993. Subsequently, on November 8, 1996, he was convicted of robbery. The robbery itself had occurred on November 18, 1994. As a result of his conviction, INS issued an Order to Show Cause on December 30, 1996, which was served on Domond on February 24, 1997, and filed with the Office of the Immigration Judge

on February 27, 1997. On March 8, 1998, an IJ determined that Domond was subject to deportation as an alien who had been convicted of an aggravated felony. Domond appealed to the BIA which dismissed his appeal on December 22, 1998. He then filed the current petition for a writ of habeas corpus on April 27, 1999.

III. *St. Cyr*

St. Cyr was admitted to the United States as a LPR on June 17, 1986. He was convicted of sale of a narcotic/hallucinogen on March 8, 1996. As a consequence, INS issued a Notice to Appear in removal proceedings on April 10, 1997, which was served on St. Cyr on July 10, 1997 and filed with the Immigration Judge on July 23, 1997. On January 12, 1998, an IJ determined that St. Cyr was subject to deportation as an alien convicted of sale of a narcotic/hallucinogen. St. Cyr appealed to the BIA which dismissed his appeal on November 10, 1998. He filed the current petition for a writ of habeas corpus on April 27, 1999.

DISCUSSION

The INA provides that any alien who has been convicted of one of several various offenses, such as an aggravated felony or a controlled substance violation, is subject to deportation. *See* 8 U.S.C.A. §§ 1227(a)(2)(A)(E) (West 1999). Prior to the 1996 amendments to the INA, an alien who faced deportation due to a criminal conviction could request discretionary relief from deportation pursuant to INA § 212(c). *See* 8 U.S.C.A. § 1182(c) (West 1995) (repealed). If that request was denied, an alien could seek review in the Courts of Appeals, *see* 8 U.S.C.A.

§ 1105(a) (West 1995) (repealed), or could petition for a writ of habeas corpus pursuant to either the INA, *see* 8 U.S.C.A. § 1105a(a) (10) (West 1995) (repealed), or the general habeas statute, *see* 28 U.S.C. § 2241 (1999).

On April 24, 1996, Congress enacted AEDPA. AEDPA § 440(d) barred INA § 212(c) relief for persons subject to deportation due to having committed any of certain enumerated criminal offenses, including aggravated felonies, and crimes involving "moral turpitude" or controlled substances. *See* AEDPA § 440(d). Later, in September 1996, Congress passed IIRIRA which repealed INA § 212(c) relief entirely and replaced it with a new type of relief designated "cancellation of removal." *See* IIRIRA § 304(b); *see also* 8 U.S.C. § 1229(b).[1] Cancellation of removal relief cannot be given to any alien that has been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3). Included in the definition of an aggravated felony is "illicit trafficking in a controlled substance." 8 U.S.C.A. § 1101(a)(43)(B).

In addition, IIRIRA supplanted the INA's judicial review provisions. *See* IIRIRA § 309(c)(1); *see also* 8 U.S.C. § 1252. In particular, the amended § 1252

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[1] IIRIRA contains two different sets of rules. First, there are the "transitional rules" which apply to persons whose removal proceedings were commenced before April 1, 1997, and against whom a final deportation order issued after October 30, 1996. *See* IIRIRA §§ 309(c), as amended by the Act of October 11, 1997, § 2, Pub. L. No. 104-302, 110 Stat. 3656, 3657. Second, there are the "permanent rules" which apply to persons whose removal proceedings commenced after April 1, 1997. *See id.* Given this Court's conclusions, discussed *infra*, regarding the pending petitions, this distinction is not relevant for current purposes.

generally limits the availability of judicial review of deportation orders to the Courts of Appeals. *See* 8 U.S.C. §§ 1252(a)-(b). As relevant to the arguments presented in this case, § 1252(g) provides that:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this act.

8 U.S.C.A. § 1252(g).

Here, the government asserts that the 1996 amendments to the INA deprive this Court of jurisdiction over St. Cyr's claim and preclude Dunbar and Domond from requesting INA § 212(c) relief.

I. *Jurisdiction*

The government contends that this Court lacks jurisdiction over St. Cyr's action because his proceedings before an IJ began after IIRIRA amended § 1252 to place severe limitations on judicial review of removal orders. In support of this claim, the government relies on *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 941-42 & 942 n.7, 142 L.Ed.2d 940 (1999) ("*AAADC* "), and *Fontes* v. *Reno*, No. 99cv10491-REK, slip op. at 8-9, (D. Mass. Mar. 9, 1999).

In *AAADC*, the Supreme Court held that § 1252(g) deprived federal courts of jurisdiction over an action that alleged that the INS had targeted certain

individuals for deportation because of their affiliation with a politically unpopular group. *See* 119 S. Ct. at 943. The Court ruled that § 1252(g) narrowly applies to preclude judicial review of the Attorney General's "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *See id.* The Court noted that many other actions exist that are part of the deportation process that are not covered by § 1252(g), and that § 1252(g) should not be read as an all-encompassing provision. *See id.* Indeed, the Court recognized that the reason this provision focuses on these discrete acts of the Attorney General is that they all represent points in a deportation proceeding at which the Attorney General could decide for humanitarian reasons to "defer action," *i.e.*, to abandon deportation proceedings against an individual who is subject to deportation. *See id.* at 943-44. This provision, then, is designed merely to shelter the Attorney General's decision to continue or discontinue a deportation proceeding, *see id.* at 944, and has no direct relevance to questions regarding a federal court's habeas jurisdiction. Indeed, in regard to the continuing validity of habeas jurisdiction, while the Supreme Court in *AAADC* expressly noted that "disagreement" exists between the Courts of Appeals concerning that issue, *see id.* at 942 n.7, it never purported to resolve that disagreement.

In pre-*AAADC* rulings, both the Second Circuit and other Courts of Appeals have held that federal courts continue even after the 1996 amendments to the INA to have jurisdiction over petitions for habeas corpus pursuant to 28 U.S.C. § 2241. *See Henderson* v. *INS*, 157 F.3d 106, 118-20 (2d Cir. 1998), *cert. denied sub nom. Navas* v. *Reno*, 526 U.S. 1004, 119 S. Ct. 1141, 143

L.Ed.2d 209 (1999); *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 219 (2d Cir. 1998), *reh'g en banc denied*, 175 F.3d 226 (1999); *see also Goncalves* v. *Reno*, 144 F.3d 110, 123 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999); *Sandoval* v. *INS*, 166 F.3d 225 (3rd Cir. 1999).

In *Jean-Baptiste*, the Second Circuit held that "in the absence of language affirmatively and clearly eliminating habeas review, we presume Congress did not aim to bar federal courts' habeas jurisdiction pursuant to § 2241." 114 F.3d at 219. In particular, the court ruled that:

> Nothing in the language of either the Antiterrorism Act or the Immigration Reform Act suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus. Those two Acts therefore do not specifically exclude habeas review in deportation cases under § 2241, and repeal by implication of the rights to petition for habeas corpus relief is disfavored.

See id. (citing, *inter alia*, *Felker* v. *Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996)).

In *Henderson*, the Second Circuit reaffirmed that § 2241 habeas remains a valid option after the 1996 amendments although the scope of review permitted has been narrowed. *See* 157 F.3d at 119. In particular, the court stated that federal courts retain the "power to review the Attorney General's interpretation of the immigration laws." *Id.* at 120 & nn. 10-12. Similarly, the First and Third Circuits have held that the 1996

INA amendments neither expressly nor implicitly repealed the ability of a petitioner to seek judicial review by a writ of habeas corpus pursuant to § 2241. *See Goncalves*, 144 F.3d at 119-23 (discussing several grounds for holding § 2241 not repealed); *Sandoval*, 166 F.3d at 238.

Here, the Court holds that it retains habeas jurisdiction over all of the petitioners' claims. Following *Jean-Baptiste*, the Court concludes that Congress has not explicitly repealed or limited § 2241 habeas jurisdiction. *See* 144 F.3d at 219. Further, the basic issue of retrospective application of the 1996 amendment and eventual repeal of § 212(c) relief is the same variety of issue over which the *Henderson* court concluded federal courts retain habeas jurisdiction. Finally, as discussed above, the Supreme Court's ruling in *AAADC* is inapposite, as it merely clarifies that § 1252(g) primarily applies to "deferred action" decisions by the Attorney General and does not address the status of habeas jurisdiction after the 1996 amendments.[2]

II. *Availability of INA § 212(c) Relief*

The government argues that the petitioners should not be entitled to INA § 212(c) relief because their deportation proceedings commenced after the effective date of AEDPA, *i.e.*, April 24, 1996. In particular, the government contends that application to the petitioners of AEDPA § 440(d)—which significantly limited the cases where section 212(c) relief could be sought—does

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[2] Based on this Court's interpretation of *AAADC* and relevant Second Circuit precedent, this Court finds the reasoning of *Fontes*, No. 99cv10491-REK, slip op. at 8-9, to be unpersuasive.

not constitute an unjustified retrospective application of § 440(d).

The Second Circuit has held in general "that § 440(d) does not apply to cases initiated before the date of its enactment." *Henderson*, 157 F.3d at 129 (expressing agreement with the First Circuit's opinion in *Goncalves*, 144 F.3d at 126). In support of this conclusion, the *Henderson* court recognized that "statutes are not ordinarily afforded retroactive effect unless 'Congress has clearly manifested its intent' to have them so applied." *Id.* (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1876, 138 L.Ed.2d 135 (1997)). However, the court found that it did not have to rely on that presumption because "when § 440(d) is read in conjunction with the rest of the AEDPA and with the legislative history of the statute, there is abundant direct evidence that the section was not intended to apply retroactively." *Id.* at 129-30 (discussing that other AEDPA sections contain explicit language of their retrospective effect and that compromise bill passed by Congress omitted Senate language that would have applied § 440(d) retroactively).

Based upon this determination, the Second Circuit held that when a petitioner's "deportation proceeding was pending on the date of the statute's enactment, . . . § 440(d) does not apply to him." *Id.* at 130 (footnote omitted). In particular, the court found that § 440(d) did not apply to a petitioner who requested INA § 212(c) relief prior to AEDPA's enactment even though the deportation hearing was held after AEDPA's enactment. *See id.* at 110, 130. The court also ruled that § 440(d) did not apply to a petitioner who

was in exclusion proceedings prior to AEDPA's enactment, which were changed to deportation proceedings after the enactment. *See id.* at 111, 130. However, due to its reading of the facts of the petitions in *Henderson*, the Second Circuit expressly stated that it "need not reach [petitioner's] broader argument that the statute should not apply to primary conduct—*i.e.*, criminal convictions—that occurred prior to April 24, 1996." *Id.* at 128 n.28.

With this background in mind, the Court now turns to the arguments advanced in these cases. Preliminarily, the government argues that this Court should not recognize a deportation proceeding as commencing until after the Order to Show Cause has been filed with the IJ. In support, the government points out that under 8 C.F.R. § 242.1(a) deportation proceedings begin when the Order is filed with the IJ. The government contends that when the Order was issued is irrelevant to whether deportation proceedings have commenced.

The Court is not convinced. This Court agrees with the District of Oregon that:

> the defendants' argument that [petitioner] was not in deportation proceedings until the order to show cause was filed with the immigration court [is unpersuasive]. As of the time the order to show cause was issued, the INS had the power to arrest him; commencement of the case in immigration court was subject only to the vagaries of administrative scheduling. From a due process standpoint, [petitioner] was subject to the deportation power of the INS as of the time the show cause order issued; fairness requires that the INS, having placed [peti-

> tioner] under its authority, should also live with the results of that decision.

Mercado-Amador v. *Reno*, 47 F. Supp. 2d 1219, 1223-1224 (D. Or. 1999) (reaffirming ruling that § 440(d) did not apply to petitioner where INS issued order to show cause prior to AEDPA's enactment but did not serve order on petitioner until after AEDPA's enactment).

Given this Court's determination that a deportation proceeding effectively begins once an Order to Show Cause has been issued to a potential deportee, *Henderson* indicates that potential deportees who have been issued Orders to Show Cause prior to the enactment of AEDPA should be allowed to request INA § 212(c) relief. *See Henderson*, 157 F.3d at 111, 130 n.30 (finding petitioner whose case changed from exclusion to deportation after April 24, 1996 and who did not request section 212(c) relief until August 2, 1996 should be provided a hearing on such relief). Here, this reasoning requires that Dunbar's petition be granted. However, as discussed below, this Court finds that alternate grounds also compel this result.

As the primary argument in these cases, the petitioners claim exactly what the Second Circuit declined to address in *Henderson*—that § 440(d) should not apply to persons whose convictions (or in Domond's case, criminal conduct only) occurred prior to April 24, 1996. The basic issue, then, is one of "retrospective application."

The Supreme Court, in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229

(1994), set forth the basic framework for addressing whether a statute applies retrospectively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280, 114 S. Ct. 1483. The Court stated that in making this determination:

> [a] court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," *see Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, 59 N.E.

> 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id. at 269-70, 114 S.Ct. 1483.

Here, the Court holds that these principles dictate that the current petitioners should have their deportation proceedings governed by the laws that were in effect at the time they committed their crimes. *See Pottinger* v. *Reno*, 51 F. Supp. 2d 349, 351 (E.D.N.Y. 1999) (stating "petitioners in all these cases should be treated as if the laws governing their rights were those in existence at the time they committed the crimes for which the government now seeks to deport them"). Alternatively, the Court believes that at the very least the date of conviction should control the determination of when a person is in deportation proceedings. *See Wallace* v. *Reno*, 24 F. Supp. 2d 104, 111-12 (D. Mass. 1998) (holding that § 440(d) does not apply to individuals whose deportation proceedings resulted from guilty pleas entered into prior to April 24, 1996). The reasons for these conclusions are set forth below.

As an initial matter, the Court finds that the type of discretionary relief the petitioners seek constitutes a legal interest that is important enough for retrospective application concerns to apply. *See Lee* v. *Reno*, 15 F. Supp. 2d 26, 45-46 (D.D.C. 1998) (stating that "even though [petitioner] never had a 'right' to receive a § 212(c) waiver, he certainly was entitled to have the opportunity to be heard and to present his case in accordance with the agency's factors" and that "at the time of [petitioner's] conduct, he could have applied for a § 212(c) wavier, and retroactive application of § 440(d)

would 'disable' him from doing so"); *see also AAADC*, 119 S. Ct. at 950 (Ginsburg, J., concurring) (recognizing that "[d]eportation . . . is a grave sanction"); *Pottinger*, 51 F. Supp. 2d at 362 ("A 'legal change that would have an impact on private parties' planning' triggers the presumption against retroactivity, even if the change is only the attachment of additional civil liability to conduct that was already deemed 'morally reprehensible or illegal'" (quoting *Landgraf*, 511 U.S. at 282-83 & n.35, 114 S. Ct. 1483)).

Here, the Court finds that the operative event for determining whether AEDPA § 440(d) and the IIRIRA amendments should apply is the actual commission of the crime for which the petitioners now face deportation. *See Pottinger*, 51 F. Supp. 2d at 355. "The time of the conviction and the time deportation proceedings commenced were happenstance, without relevance to the reason for congressional treatment of criminal permanent resident aliens." *Id.* Indeed, the very purpose of the amendments was to change the legal consequences of certain criminal conduct, not the consequences of being convicted of that conduct or having deportation proceedings commenced.

As recognized by the Second Circuit in *Henderson* and expounded upon by the Eastern District of New York in *Pottinger*, AEDPA contains several provisions that provide varying degrees of retroactivity for their application. *See Pottinger*, 51 F. Supp. 2d at 359 (reviewing how "AEDPA section 440(d)'s silence as to temporal reach stands in stark contrast to the finely calibrated retroactivity language of other AEDPA sections"). This state of affairs leaves no doubt as to the ability of Congress to delineate the temporal reach

of a statute. The failure of Congress to explicitly and clearly indicate whether the amendments limiting and ultimately repealing INA § 212(c) relief should apply to primary conduct predating the enactment of those amendments leaves no room for doubt that they the amendments should not be applied retrospectively. *Cf. id.* at 360-361 (stating "Congress's choice not to include . . . any retroactivity language—in section 440(d) is reasonably construed as evidence of its plan to designate the section as applicable only to post-enactment conduct").

As noted in *Pottinger*, this conclusion is bolstered by the Supreme Court's recognition that statutes are generally presumed not to apply retrospectively:

> The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

Id. (quoting *Landgraf*, 511 U.S. at 265, 114 S. Ct. 1483). In addition, this Court concurs with the view that "the rule of lenity complements *Landgraf* in requiring the statute to be read in favor of the petitioner." *Id.* at 363.

Here, this determination requires that all of the current petitions be granted because all of the petitioners

committed the crimes which provide the basis for their deportation proceedings prior to April 24, 1996.

In the event of an appeal and rejection of the primary holding in this case, the Court notes its belief that at a minimum the date of conviction should govern a potential deportee's eligibility for INA § 212(c) relief. *See Wallace*, 24 F. Supp. 2d at 111-12; *see also Pottinger*, 51 F. Supp. 2d at 360-61. As recognized in *Wallace*, attorneys have a professional duty to discuss the immigration consequences of a conviction with their noncitizen clients and a large percentage of INA § 212(c) requests for relief have been granted. *See Wallace*, 24 F. Supp. 2d at 110-11 (noting, in regard to guilty pleas, that "a noncitizen criminal defendant would most likely have been informed of and had good reason to consider the immigration consequences of a guilty plea"). These considerations indicate that potential deportees would have had settled expectations and reasonably relied on their eligibility for INA § 212(c) relief at the time of their guilty pleas or convictions. Under these circumstances, the Court concludes that the *Landgraf* principles counsel that the amendments to AEDPA and IIRIRA at issue should not apply retroactively to bar petitioners whose convictions predate those amendments from requesting INA § 212(c) relief.[3]

A brief concluding remark is appropriate. These consolidated cases represent yet another example of the costly and unnecessary litigation that is spawned by Congress when it fails to indicate whether legislation

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[3] The Court notes that if the operative date is found on appeal to be the date of guilty plea or conviction, then all of the petitioners except Domond will still be eligible to request INA § 212(c) relief.

should be applied retrospectively. A one line sentence could have avoided these and many other cases currently pending before the courts of this Circuit and its sister Circuits.

CONCLUSION

For the reasons stated above, Dunbar's petition [doc. # 1 (3:99cv260(AHN))] is GRANTED, Domond's petition [doc. # 1 (3:99cv772(AHN))] is GRANTED, and St. Cyr's petition [doc. # 1 (3:99cv773(AHN))] is GRANTED. The Clerk is ordered to CLOSE these cases.

SO ORDERED this 23rd day of August, 1999 at Bridgeport, Connecticut.

/s/ ALAN H. NEVAS
ALAN H. NEVAS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

3:99CV773AHN

ENRICO ST. CYR

v.

IMMIGRATION AND
NATURALIZATION SERVICE

[Filed Aug. 30, 1999]

JUDGMENT

This cause came on for consideration on a petition for habeas corpus by the Honorable Alan H. Nevas, Senior U.S. District Judge, and

The Court having considered the petition and all the papers submitted in connection therewith, filed its Ruling on Petition for Habeas Corpus granting the petition and allowing the petitioners to apply for a statutorily repealed form of discretionary relief from deportation.

It is therefore ORDERED and ADJUDGED that the writ of habeas corpus is granted and Immigration and Naturalization is to allow petitioners to apply for discretionary relief from deportation pursuant to the Court's ruling.

Dated at Bridgeport, Connecticut, this 30th day of August, 1999.

KEVIN F. ROWE, CLERK

By Signature illegible
Deputy Clerk

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A41 052 179 – Hartford Date: Nov 10 1998

In re: ENRICO SAINT CYR a.k.a. Enrico St. Cyr

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Michael G. Moore, Esquire
[REDACTED]
[REDACTED]

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Waiver of Inadmissibility; cancellation of removal

ORDER:

PER CURIAM. The respondent's appeal fee waiver request is granted. See 8 C.F. R. § 3.8(c). The appeal is dismissed. The respondent is a native and citizen of Haiti, and a United States lawful permanent resident.

The record reflects that in 1996, he was convicted of sale of a hallucinogen/narcotic in the State of Connecticut (Exh. 2). Based on this evidence, the Immigration Judge found the respondent removable as charged. The respondent requested a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), which the Immigration Judge denied.

On appeal, the respondent argues that he is eligible for a section 212(c) waiver of inadmissibility. We disagree as section 212(c) relief is not available in removal proceedings, which the respondent is properly in. Section 212(c) was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996), and was replaced with cancellation of removal under section 240A, 8 U.S.C. § 1229b. The respondent is statutorily ineligible for cancellation of removal as his criminal conviction constitutes an aggravated felony. See sections 101(a)(43)(B), 8 U.S.C. §§1101(a)(43)(B), and 240A(a)(3). Accordingly, the appeal is dismissed.

/s/ JOHN GUENDELSBERGER
JOHN GUENDELSBERGER
FOR THE BOARD

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:	Case No. A 41 052 179
ENRICO ST. CYR	Docket: MACDOUGUAL
RESPONDENT	REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1-12-98. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☒ The respondent was ordered deported to HAITI.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

☐ Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to_____ or _____.

☐ Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☒ Respondent's application for waiver under Section 212(c) of the Immigration and Nationality Act was ( ) granted (X) denied ( ) withdrawn ( ) other.

☐ Respondent's application for _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Proceedings were terminated.

☐ The application for adjustment of status under Section (216)(216A)(245)(249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

☐ Respondent's status was rescinded under Section 246.

☒ Other 2-11-98 _____.

☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Signature illegible
Immigration Judge

Date: 1-12-98

Appeal: RESERVED/WAIVED (A/I/B)

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall

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[1] Section 1182(c) of Title 8 was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. The version set forth in the text reflects both sets of amendments.

limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 235(b) of the Immigration and Nationality Act, 8 U.S.C. 1225(b) (Supp. IV 1998), provides in pertinent part:

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

* * * * *

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and ques-

tioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

* * * * *

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

* * * * *

7. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. 1229b(a) (Supp. IV 1998), provides:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel the removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (a) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (b) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (c) has not been convicted of any aggravated felony.

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. IV 1998), provides in pertinent part:

> **§ 1252. Judicial review of orders of removal**
>
> **(a) Applicable provisions**
>
> **(1) General orders of removal**
>
> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not

order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

* * * * *

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to

their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

* * * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * * *

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this

subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such

further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

* * * * *

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

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[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA.

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

> **EFFECTIVE DATES; TRANSITION.**
>
> (a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").
>
> * * * * *
>
> (c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
>
> (1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

* * * * *

13. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]
>
> * * * * *